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DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

WEST MIDLANDS JOINT ELECTRICITY AUTHORITY *v.* PITT AND OTHERS.

MINISTER OF TRANSPORT *v.* SAME.

[1930. W. 3025.]
[1931. T. 196.]

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Electricity—Supply—Wayleave—Power to place Electric Lines across Land—Consent of Minister of Transport—" Terms, conditions, and stipulations "—Pecuniary Terms—Landowner's Right to Compensation—Mode of Computation—Electric Lighting Act, 1882 (45 *&* 46 *Vict. c.* 56), *ss.* 17, 28—*Acquisition of Land* (*Assessment of Compensation*) *Act*, 1919 (9 *&* 10 *Geo.* 5, *c.* 57), *ss.* 1, 2—*Electricity* (*Supply*) *Act*, 1919 (9 *&* 10 *Geo.* 5, *c.* 100), *s.* 22, *sub-s.* 1; *s.* 39, *s.* 40, *sub-s.* 2.

By s. 17 of the Electric Lighting Act, 1882: " In the exercise of the powers in relation to the execution of works given them under this Act, or any license, order, or special Act, the undertakers shall cause as little detriment and inconvenience and do as little damage as may be, and shall make full compensation to all bodies and persons interested for all

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damage sustained by them by reason or in consequence of the exercise of such powers, the amount and application of such compensation in case of difference to be determined by arbitration."

By s. 1, sub-s. 1, of the Acquisition of Land (Assessment of Compensation) Act, 1919: "Where by or under any statute (whether passed before or after the passing of this Act) land is authorised to be acquired compulsorily by any Government Department or any local or public authority, any question of disputed compensation . . . . shall be referred to and determined by the arbitration of such one of a panel of official arbitrators to be appointed under this section as may be selected in accordance with rules made by the Reference Committee under this section."

By s. 22, sub-s. 1, of the Electricity (Supply) Act, 1919: "A joint electricity authority or any authorised undertakers may place any electric line . . . . across any land other than land covered by buildings or used as a garden or pleasure ground in cases where the placing of such lines above ground is otherwise lawful. . . . . Provided that, before placing any such line across any land, the joint electricity authority or undertakers shall serve on the owner and occupier of the land notice of their intention, together with a description of the nature and position of the lines proposed to be so placed; and if, within twenty-one days after the service of the notice, the owner and occupier fail to give their consent or attach to their consent any terms or conditions or stipulations to which the joint electricity authority or the undertakers object, it shall not be lawful to place the line across that land without the consent of the Board of Trade; and the Board of Trade may, if after giving all parties concerned an opportunity of being heard they think it just, give their consent either unconditionally or subject to such terms, conditions, and stipulations as they think just; and in deciding whether to give or withhold their consent, or to impose any terms, conditions, or stipulations . . . . the Board shall, among other considerations, have regard to the effect, if any, on the amenities or value of the land of the placing of the line in the manner proposed."

By the combined effect of s. 39, sub-s. 1, and an Order made in 1920 (S. R. & O., No. 38 of 1920): "All the powers and duties of the Board of Trade under this Act or the Electric Lighting Acts, or the orders and regulations made thereunder, or any local Act relating to the supply of electricity, or any enactment relating to matters incidental to such supply" were transferred to the Minister of Transport:—

Held, that the "terms, conditions, and stipulations" which the Minister of Transport may attach to his consent under s. 22, sub-s. 1, of the Electricity (Supply) Act, 1919, do not include pecuniary terms. The owner of the land across which an electric line is placed is entitled to receive compensation, and to have the amount of that compensation assessed under s. 17 of the Electric Lighting Act, 1882, by an arbitrator appointed under s. 28 of that Act, or in cases where the Acquisition of Land (Assessment of Compensation) Act, 1919, applies, by an official arbitrator under that Act. He is not entitled to have compensation assessed under the Lands Clauses Consolidation Act, 1845, and amending Acts.

Consolidated Actions tried by Macnaghten J. without a jury.

The following statement of the facts is taken from the judgment of Macnaghten J. :—

For the purpose of promoting, regulating, and supervising the supply of electricity throughout the country the Electricity (Supply) Act, 1919 (9 & 10 Geo. 5, c. 100), provided for the appointment of a body called the Electricity Commissioners. By that Act the Commissioners so appointed were authorized to divide the United Kingdon into electricity districts and to establish a joint electricity authority for each district. By s. 8 of the Act every joint electricity authority was charged with the duty of providing or securing the provision of a cheap and abundant supply of electricity within its district, and was empowered to construct such generating stations, main transmission lines and other works as might be required for that purpose.

In 1925, the Electricity Commissioners, by an Order called "The West Midlands Electricity District Order, 1925," constituted the West Midlands Electricity District, comprising the county boroughs of Walsall, West Bromwich and Wolverhampton, and certain parts of the administrative counties of Salop, Stafford and Worcester; and by the same Order the first-named plaintiffs, the West Midlands Joint Electricity Authority, were established and incorporated as the joint electricity authority for that district. The defendants are owners and occupiers of land in that part of Shropshire which is included in the West Midlands Electricity district. In 1929, the West Midlands Joint Electricity Authority were minded to construct main transmission lines from Ironbridge to Bridgnorth, a distance of some seven or eight miles, passing over the lands of the defendants, and on October 16, 1929, they obtained from the Minister of Transport his consent under s. 10 (*b*) of the Schedule to the Electric Lighting (Clauses) Act, 1899 (62 & 63 Vict. c. 19), to that proposal. The consent was qualified by the reservation of "power to review the situation at any time after the expiration of five years." Before the passing of the Electricity (Supply) Act,

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1919, there was no general statute which authorized the placing of electric lines on private lands, but by s. 22, sub-s. 1, of that Act it was provided as follows: "A joint electricity authority or any authorised undertakers may place any electric line below ground across any land, and above ground across any land other than land covered by buildings or used as a garden or pleasure ground in cases where the placing of such lines above ground is otherwise lawful, and where any line has been so placed across any land the joint electricity authority or undertakers may enter on the land for the purpose of repairing or altering the line: Provided that, before placing any such line across any land, the joint electricity authority or undertakers shall serve on the owner and occupier of the land notice of their intention, together with a description of the nature and position of the lines proposed to be so placed; and if, within twenty-one days after the service of the notice, the owner and occupier fail to give their consent or attach to their consent any terms or conditions or stipulations to which the joint electricity authority or the undertakers object, it shall not be lawful to place the line across that land without the consent of the Board of Trade; and the Board of Trade may, if after giving all parties concerned an opportunity of being heard they think it just, give their consent either unconditionally or subject to such terms, conditions, and stipulations as they think just; and in deciding whether to give or withhold their consent, or to impose any terms, conditions, or stipulations (including the carrying of any portion of the line underground) the Board shall, among other considerations, have regard to the effect, if any, on the amenities or value of the land of the placing of the line in the manner proposed." The marginal note to this section is simply "Wayleaves," and the rights acquired under this section by a joint electricity authority or by authorized undertakers are described as wayleaves in s. 21, sub-s. 1, of the Electricity (Supply) Act, 1926 (16 & 17 Geo. 5, c. 51).

Shortly after the passing of the Act the powers of the Board of Trade were, pursuant to the provisions of s. 39

sub-s. 1, transferred to the Minister of Transport, and references to the Board of Trade in s. 22 must, therefore, be construed as references to the Minister of Transport.

In accordance with the provisions of that section the West Midlands Joint Electricity Authority served on each of the defendants notice of intention to place electric lines across their lands. For the purposes of this case it is sufficient to take the notice served on the first-named defendant, Mr. W. J. Pitt. In the first instance a notice, dated January 14, 1930, was served on Mr. Pitt; but that notice was subsequently withdrawn and an amended notice, dated March 20, 1930, was duly served upon him.

The notice was in the following terms: "To W. J. Pitt, Esq., of The Albynes, Nordley, Bridgnorth. Pursuant to s. 22, sub-s. (1), of the Electricity (Supply) Act, 1919, the West Midlands Joint Electricity Authority hereby give you Notice that it is their intention to place certain electric lines below and above ground across the land of which you are the owner and part occupier in the parish of Astley Abbotts in the County of Salop, as shown on the Plan annexed hereto. A description of the nature and position of the lines proposed to be so placed is given in the Schedule hereto. Notice is also hereby given that if within twenty-one days after the service upon you of this notice you fail to give your consent to the said lines being so placed, or if you attach to your consent any terms, conditions or stipulations to which the Authority object, the Authority will in accordance with the provisions of the said section apply to the Minister of Transport for his consent to the placing of the said lines." The Notice was dated March 20, 1930, and was signed by H. F. Carpenter, clerk to the West Midlands Joint Electricity Authority. The schedule referred to in the notice as describing the nature and position of the lines proposed to be so placed is in the following terms: "Overhead 33,000 volt three phase 50-cycle double circuit transmission line supported by nine and one-half section galvanised steel towers at a height above the land of not less than twenty feet, together with any necessary earth wires, earth plates,

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switch boxes and other equipment required. Two underground 33,000 volt three phase 50-cycle paper insulated lead covered steel wire armoured cables protected by ferro concrete slabs laid at a depth of not less than three feet below the surface of the land. The approximate positions of the line, towers and cables are shown upon the plan attached hereto as follows: Overhead line—Red line, towers—X. with red circle, Underground cables—Blue line." Annexed to the notice was a form of consent to be signed by Mr. Pitt. The form set out the various terms and conditions by which the Authority were willing to be bound. These terms and conditions provided (inter alia) that Mr. Pitt might withdraw his consent by giving twelve months' notice in writing, and that, if he should at any time require the land or any part of it for building, or other purposes, necessitating the removal of the electric lines, the Authority would at their own expense remove them. They also provided that during the continuance of the consent the Authority would pay to Mr. Pitt the annual rentals specified therein—namely, 16*s.* per steel tower on arable land, 8*s.* per tower on grass land, and 4*s.* per tower on other land, and the sum of 6*d.* per stay for all stays erected on the land. The notices served on the other defendants were similar to the notice served on Mr. Pitt.

None of the defendants consented to the placing of the proposed lines across their lands; and the Authority in due course applied to the Minister of Transport for his consent. The Minister thereupon, in order to comply with the provision in the section requiring him to give all the parties concerned an opportunity of being heard, appointed Mr. F. Gordon Tucker, one of the officials of the Ministry of Transport, to hold an inquiry, and the inquiry was duly held by Mr. Tucker at the Town Hall at Bridgnorth on April 30, 1930. At the inquiry the defendants were represented by counsel, who submitted on their behalf that the compensation payable to them in respect of the proposed wayleaves ought to be assessed by an official arbitrator under the Acquisition of Land (Assessment of Compensation) Act, 1919

(9 & 10 Geo. 5, c. 57), but he took no further part in the proceedings.

On May 30, 1930, the Minister consented to the placing of the proposed electric lines across the lands of the defendants. The instrument giving his consent, after reciting that the West Midlands Joint Electricity Authority were the undertakers for the purposes of the West Midlands Electricity District Orders, 1925 and 1927, and after setting out the provisions of s. 22, sub-s. 1, and s. 39 of the Electricity (Supply) Act, 1919, proceeds as follows: "And whereas on the sixteenth day of October, 1929, the Minister of Transport gave his consent under the provisions of s. 10 (*b*) of the Schedule to the Electric Lighting (Clauses) Act, 1899, as incorporated with the West Midlands Electricity District Order, 1925, to the placing of electric lines above ground from Ironbridge to the boundary of the Borough of Bridgnorth. And whereas the Authority proposed in exercise of the power conferred on them by the said s. 22 to place electric lines partly above and partly below ground across certain lands situated in the Parish of Astley Abbotts in the County of Salop and belonging or reputed to belong to William James Pitt (such person or other the owner or owners for the time being of the said lands being hereinafter referred to as 'the Owner'). And whereas the Authority duly served a Notice and description as required by the said s. 22 upon the Owner and the Occupiers of the said lands." Here I pause, because it was alleged on behalf of the defendants that the consent did not indicate precisely what were the lines to which the Minister consented. It is clear that this recital refers to the notice which the Authority had served upon Mr. Pitt, dated March 20, 1930, and that the consent given by the Minister was a consent to the construction of the lines therein mentioned and no other. The instrument goes on: "And whereas the Owner and the Occupiers have failed to give their consent to the placing of the said electric lines across the lands in question. And whereas the Authority have applied to the Minister of Transport for his consent under the said s. 22 to the placing of the said lines across the said lands and the Minister has given all parties concerned an opportunity of being heard and has fully considered the matter including the effect of the placing of the said electric lines in the manner proposed on the amenities or value of the lands in question. Now therefore the Minister of Transport by virtue and in exercise of the powers conferred by the said s. 22 and of every other power thereunto him enabling hereby consents to the Authority placing the said electric lines across the lands belonging or reputed to belong to the Owner and coloured green on the plan annexed hereto above ground along the routes delineated in red and below ground along the route delineated in yellow on the said plan, subject to the following terms and conditions." By these terms and conditions the Minister, disregarding the submission which had been made to Mr. Tucker that it was outside his province to assess the compensation payable to the landowner, prescribed the payment of certain annual rentals by the Joint Authority. In the case of the towers with a base not exceeding 13 feet square, the rentals prescribed by the Minister were the same as those which the Joint Authority had offered to pay, but in the case of towers with a base exceeding 13 feet square, the rentals offered by the Authority were increased by 20 per cent. The rentals for stays were also increased—in the case of stays on arable land from 6*d.* to 4*s.*, and in the case of stays on grass land from 6*d.* to 2*s.* The terms and conditions prescribed by the Minister incorporated by reference the terms and conditions contained in the form of consent which the Authority had submitted to the defendants, except the clause enabling them to withdraw their consents and to require the lines across their land to be removed ; and except also a provision contained in the Authority's form of consent that any dispute between the parties should be referred to the Minister for decision.

The terms and conditions prescribed by the Minister provided that any such dispute should be referred to an arbitrator appointed by the Surveyors' Institute ; they also contained the following provision: "The Minister reserves to himself the power to renew this consent at any time after October 16, 1934," a provision which means presumably that the Minister gives his consent for certain up to October 16, 1934, but that after that date he may withdraw his consent if he thinks fit to do so. In accordance with the consent so given by the Minister, the West Midlands Joint Electricity Authority have erected these main transmission lines across the lands of the defendants, but it should be stated that by arrangement between the parties, and without prejudice to the question at issue in this action, the whole of the lines across Mr. Pitt's land have been constructed as overhead lines; none have been placed underground.

The description of the electric lines set out in the schedule to the notices served by the Joint Authority on the defendants gave no indication of the size of the proposed galvanized steel towers or of the manner of their construction, but the plans and photographs which were put in evidence at the trial, together with the oral testimony of Mr. A. J. Sumner, an engineer in the service of the West Midlands Joint Electricity Authority, afford full information on those points. The towers, placed about 800 feet apart, are some 50 feet high. They are erected on solid concrete foundations and these foundations vary in size from 14 feet square to 25 feet square. Thirty-three towers and one half tower have been erected on the land belonging to the several defendants, and the total area occupied by these towers is 10,643 square feet. It is obvious that apart from any other objection these towers must interfere with the use of the defendants' fields, whether for the purpose of cultivation or pasture, to a greater or lesser extent depending on the precise position in which they may be placed. It cannot be doubted they must injuriously affect properties of the defendants.

On June 25 the defendants applied to the Reference Committee under the Acquisition of Land (Assessment of Compensation) Act, 1919, for the selection of an official arbitrator to hear and determine their claims for compensation in respect of the wayleaves which the West Midlands Joint Electricity Authority had then acquired,

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and on July 3, 1930, the Reference Committee selected Mr. John Willmot as the official arbitrator for that purpose. Mr. Willmot accepted the appointment and was ready and willing to proceed with the reference. In these circumstances, on August 2, 1930, the West Midlands Joint Electricity Authority commenced an action against the defendants with a view to obtaining the decision of the Court on the claim of the defendants that the compensation payable to them in respect of these wayleaves ought to be assessed by an official arbitrator under the Acquisition of Land (Assessment of Compensation) Act, 1919, and—there being no dispute with regard to the facts—on November 25 an order was made for the statement of a special case for the opinion of the Court. Thereupon, on January 30, 1931, the Minister of Transport commenced an action against the defendants, and by an order of a Master, dated March 24, 1931, the two actions were consolidated. The order for the statement of a special case was then discharged, and the usual directions for the delivery of pleadings and the discovery of documents was given. Pursuant to those directions, a statement of claim was delivered on April 17; a defence and counterclaim on June 3, and a reply on June 26, and on November 25 the action came on for trial before me.

The plaintiffs claimed the following declarations:—

(*a*) That the Minister of Transport in giving his consent under s. 22 of the Electricity (Supply) Act, 1919, to the placing of an electric line across any land is entitled to give such consent subject to a term, condition, or stipulation as to the monetary payment to be made by a joint electricity authority in respect of the wayleaves for such line.

(*b*) That four several consents of the Minister of Transport, dated May 30, 1930, under s. 22, to the placing by the plaintiff authority of certain electric lines across certain lands of the defendants subject to the terms and conditions therein set forth were valid and binding on the defendants.

(*c*) That the plaintiff authority on complying with the terms and conditions were entitled to place and keep the electric lines across the lands of the defendants.

(*d*) That when the Minister of Transport gave his consent under s. 22 to the placing of an electric line across any land, the official arbitrator under the Acquisition of Land (Assessment of Compensation) Act, 1919, had no jurisdiction to determine any question as to the compensation to be paid for the wayleaves for such line, the Minister of Transport being the proper authority for determining any such question.

The defendants contended that the Minister of Transport, having given his consent under s. 22, was functus officio and was thereafter not interested in the question whether or not the plaintiff Authority were or were not liable to pay compensation, or of the proper tribunal to assess such compensation. They also contended that the Court had no jurisdiction, or, alternatively, that in its discretion it ought not to grant the declarations asked for by the Minister of Transport.

The defendants, by their counterclaim, claimed :—

(*a*) A declaration that the consents of May 30, 1930, were ultra vires and void; (*b*) a declaration that if and when the Minister of Transport gave his consent under s. 22 to the placing of an electric line across the land the owners and occupiers were entitled to claim compensation under the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), and amending Acts; (*c*) that the claims of the defendants in respect of the wayleaves ought to be determined by arbitration pursuant to the provisions of the Electric Lighting Act, 1882 (45 & 46 Vict. c. 56), and the Acquisition of Land (Assessment of Compensation) Act, 1919.

They further claimed a declaration that the term as to rental was ultra vires and that the consents were ultra vires by reason of omission to define with reasonable exactitude the nature and position of the electric line to be placed across the defendants' land.

Sir William Jowitt A.-G., *Sir Thomas Inskip S.-G.*, and *Bowstead* for the Minister of Transport. The question raised in these consolidated actions is whether the Minister of Transport, in giving his consent under s. 22, sub-s. 1, of the Electricity (Supply) Act, 1919, to the placing of electric lines

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across any land, has power to assess the compensation payable to the owners of the land, or, as the defendants contend, their claim to compensation in respect of the wayleaves across their land ought to be determined by arbitration under the provisions of the Electric Lighting Act, 1882, and the Acquisition of Land (Assessment of Compensation) Act, 1919. The Electricity (Supply) Act, 1919, was passed to amend the law with respect to the supply of electricity. Its primary object was to provide a cheap and abundant supply of electricity. For that purpose it is necessary to erect towers to carry electric lines across land, and s. 22 empowers a joint electricity authority or any electric undertakers to place electric lines across land, provided that before placing any such line across any land notice of their intention so to do is served on the owner and occupier of the land together with a description of the nature and position of the lines proposed to be so placed; and if, within twenty-one days after the service of the notice, the owner and occupier fail to give their consent or attach to their consent any terms or conditions or stipulations to which the joint electricity authority or the undertakers object, it shall not be lawful for them to place such electric lines across that land without the consent of the Minister of Transport (who was substituted for the Board of Trade by an Order in Council made under s. 39, sub-s. 1, of the Electricity (Supply) Act, 1919). The Minister of Transport, after giving all parties concerned an opportunity of being heard, may give his consent either unconditionally, or subject to such terms, conditions, and stipulations as he thinks just. The words "terms, conditions, and stipulations" are unqualified, and therefore must include pecuniary as well as other terms. The genus "terms" would include pecuniary as well as non-pecuniary terms. There is no ground for holding, as a matter of construction, that the expression, "terms, conditions, and stipulations," in s. 22 does not cover pecuniary terms. The Electric Lighting Act, 1882, was the first Act of Parliament passed to facilitate and regulate the supply of electricity in this country. There is no power in that Act to acquire land compulsorily. Sect. 10 of that Act deals with the acquisition of land by agreement. Sect. 14 deals with overhead electric lines in a rudimentary form. Sect. 17 provides that the undertakers shall cause as little detriment and inconvenience and do as little damage as may be, and shall make full compensation to all bodies and persons interested for all damage sustained by them in consequence of the exercise by the undertakers of any powers under the Act, the amount and application of such compensation in case of difference to be determined by arbitration. By s. 28 of the Act, where any matter is referred to arbitration by that Act (e.g., ss. 16 and 17), such matter shall, except as otherwise expressly provided, be determined by an engineer or other fit person. The defendants in this case claim that the question of compensation shall be determined by arbitration under the Electric Lighting Act, 1882, or under the Acquisition of Land (Assessment of Compensation) Act, 1919. The Electric Lighting Act, 1882, does not incorporate those provisions of the Lands Clauses Consolidation Act, 1845, dealing with the acquisition of land otherwise than by agreement. Nor is there any provision in the Act of 1882 itself dealing with the acquisition of land otherwise than by agreement. The Electric Lighting Act, 1888 (51 & 52 Vict. c. 12), s. 2, provides for the purchase of an electricity supply undertaking by a local authority. The Electric Lighting Act, 1909 (9 Edw. 7, c. 34), is the first of the Electric Lighting Acts to confer compulsory powers to purchase land, and the powers conferred by that Act are very limited. All the Electric Lighting Acts are to be read together as one Act, and wherever the expression "terms" is used in any of those Acts, it includes pecuniary terms.

The Acquisition of Land (Assessment of Compensation) Act, 1919, provides for the assessment of compensation in the case of land which is authorized to be acquired compulsorily for public purposes. It sets up a tribunal consisting of a panel of persons to act as arbitrators to determine any question of disputed compensation. Assuming that the wayleave acquired in this case under s. 22, sub-s. 1,

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of the Electricity (Supply) Act, 1919, is land within the meaning of the Acquisition of Land (Assessment of Compensation) Act, 1919, there is here no question of disputed compensation. Sect. 22, sub-s. 1, of the Electricity (Supply) Act, 1919, properly construed, does provide for the payment of compensation, but the compensation is to be assessed, not by an arbitrator, but by the Minister of Transport himself. The Acquisition of Land (Assessment of Compensation) Act, 1919, cannot apply to this case. That Act only applies where land is taken compulsorily by a Government Department or any local or public authority, and if the joint electricity authority which is acquiring the wayleave is not a local or public authority the Act does not apply. It is admitted, however, that the Court is bound to adopt the reasoning of Peterson J. in *Metropolitan Water Board* v. *Berton* (1), and must therefore hold that the West Midlands Joint Electricity Authority is a public authority within the meaning of s. 2 of the Acquisition of Land (Assessment of Compensation) Act, 1919. But the point is kept open, and the right is reserved to argue in a higher Court that Peterson J.'s reasoning and decision in that case are erroneous, and that the West Midlands Joint Electricity Authority is not a public authority within the meaning of the Act. The Acquisition of Land (Assessment of Compensation) Act, 1919, received the Royal Assent on August 19, 1919, and the Electricity (Supply) Act, 1919, on December 23, 1919, and if the two Acts are inconsistent the later Act must prevail: *Rex* v *Middlesex Justices* (2); *British Columbia Electric Ry. Co.* v. *Stewart.* (3)

The Electricity (Supply) Act, 1919, sets up a body called the Electricity Commissioners, who are given certain powers in respect of the promotion, regulation, and supervision of the supply of electricity. They may provisionally determine that any district in the United Kingdom shall be constituted as a separate electricity district for the purposes of the Act, and they may allow schemes for the improvement of the existing organization for the supply of electricity. Sect. 6

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(1) [1921] 1 Ch. 299.

(2) (1831) 2 B. & Ad. 818, 821, 822.

(3) [1913] A. C. 816, 828.

provides that any such scheme may provide for the establishment of a joint electricity authority representative of authorized undertakers within the electricity district, with or without the addition of representatives of certain interests mentioned in the section. Any such scheme may provide for the transfer to the joint electricity authority of the whole or any part of the undertakings of any of the undertakers upon such terms as may be provided by the scheme. The word "terms" in that section must include pecuniary terms. The expression "terms" is also used in the proviso to s. 12, sub-s. 1; the expression "terms and conditions" in s. 12, sub-s. 3; and the word "conditions" in s. 13, sub-s. 3. In s. 18, sub-s. 2, the words "terms and conditions as to interest, repayment, and otherwise" are used. The expression "terms and conditions" is also used in s. 19. Down to that section, wherever the expression "terms" is used in the Act it is clear that it includes pecuniary terms. Sect. 22 must be construed in the same sense. Therefore, the Acquisition of Land (Assessment of Compensation) Act, 1919, does not apply. Sect. 22 contemplates that the Minister shall attach to his consent certain "terms, conditions, and stipulations." The terms, eonditions, and stipulations imposed by the Minister must be of the same kind as the terms, conditions, and stipulations which the owner would be likely to impose for consenting to his land being used for the purposes of the Act, and any reasonable landowner would attach monetary terms, conditions, and stipulations to his consent. If, therefore, the expression "terms" includes "pecuniary terms" in one part of the sub-section, it must bear the same meaning in another part of it. In the case of electric lines placed or proposed to be placed over or upon or under any line of railway the Railway and Canal Commission has power to impose pecuniary terms: see s. 22, sub-s. 2. That is conclusive with regard to the construction of s. 22. It is provided at the end of sub-s. 1 of s. 22 that in deciding whether to give or withhold their consent, or to impose any terms, conditions, or stipulations (including the carrying of any portion of the line underground), the Board (now the

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Minister of Transport) shall, among other considerations, have regard to the effect, if any, on the amenities or value of the land of the placing of the line in the manner proposed. It would be a strange thing if pecuniary terms were to be excluded there.

Moreover, some further light is thrown on the sub-section by s. 11 of the Electricity (Supply) Act, 1922 (12 & 13 Geo. 5, c. 46), because the provisions of that section indicate that the Legislature must have thought that the word "terms" in s. 22, sub-s. 1, of the Act of 1919 included pecuniary terms. Sect. 11 of the Act of 1922 provides that where an electric line has by agreement been placed over any land and the agreement has terminated, the electricity authority, in certain circumstances, may apply to the Minister of Transport for a revision of the terms and conditions contained in the agreement, and the terms which the Minister is authorized to revise must include pecuniary terms. Bearing in mind that all the Electricity Acts must be read together as one Act, it is clear that the word "terms" includes pecuniary terms, and therefore the Minister has power under the sub-section to attach to his consent the terms with regard to the payments to be made to the landowners for the wayleave.

Craig Henderson K.C. and *Sydney Turner K.C.* for the plaintiffs, the West Midlands Joint Electricity Authority.

W. E. Tyldesley Jones K.C. and *A. M. Trustram Eve* for the defendants. The Minister of Transport claims that Parliament has conferred on him the sole right to decide whether a landowner should have his land used for the purpose of the Electricity (Supply) Act, 1919, without receiving any compensation therefor. The main question here is not whether the expression "terms" in s. 22 includes pecuniary terms, but whether the Minister of Transport has the sole right which he claims. It has been held that an intention to take away the property of the subject without giving him any legal right to compensation cannot be imputed to the Legislature unless that intention is expressed in unequivocal terms: *Central Control Board (Liquor Traffic)* v. *Cannon*

Brewery Co., Ld. (1); see also *Attorney-General* v. *Horner* (2) and *Commissioner of Public Works (Cape Colony)* v. *Logan.* (3) At the public inquiry, which was held by an official of the Ministry of Transport, the defendants claimed to have the question of compensation determined under the Acquisition of Land (Assessment of Compensation) Act, 1919. There was no material before the Ministry of Transport official who held the inquiry which would enable him to form an opinion on the question of compensation. Nor was there any material before him to enable him to consider the effect of the proposed electric lines on the amenities and value of the land. It is impossible to assess the depreciation in the value of the land by reason of the placing of the electric lines over it, without some evidence of the value of the land itself. The effect of the argument put forward on behalf of the Minister of Transport is that the owner of the land over which the electric line is placed must accept whatever compensation, if any, the Minister of Transport may fix, while an adjoining owner, who may be seriously affected, can claim compensation under s. 17 of the Electric Lighting Act, 1882, which gives a right to compensation for damage resulting from the execution of works, not for damage caused by their use when constructed: *Shelfer* v. *City of London Electric Lighting Co.* (4); *Roderick* v. *Aston Local Board* (5); and *In re Dudley Corporation and Earl of Dudley's Trustees.* (6) The defendants are entitled to have the question and amount of compensation determined either under the Acquisition of Land (Assessment of Compensation) Act, 1919, in which case it would be assessed by an official arbitrator, or under s. 17 of the Electric Lighting Act, 1882, by an arbitrator appointed by the Minister of Transport, or under the Lands Clauses Acts, when it might be by a jury. It does not matter in this case which it is. The Minister is empowered by s. 22 to give his consent unconditionally or subject to terms, conditions, and stipulations. If it were not for s. 17 of the Electric Lighting Act, 1882, the expression "terms" might have included terms with regard to compensation. But the Minister cannot get rid of the landowner's statutory right to compensation by purporting to attach a condition. The terms and conditions intended by s. 22 are terms and conditions to protect the landowner, not to cut down his rights. They include, for example, terms and conditions with regard to the time at which the work may be done, or the height at which the electric lines may be carried, or that the lines shall be carried underground to avoid spoiling a view. The Minister is entitled to consider whether the value of the land is such that it might be uneconomic to take it and pay compensation, or the amenities may be such that no compensation would be adequate. The Minister is entitled to give his consent on the terms that, in addition to compensation payable under s. 17 of the Act of 1882, the electricity authority shall pay an annual rent of 1*l.* per tower for the wayleave, but not, as he has done here, to award rent in lieu of compensation. Sub-s. 2 of s. 22 makes it clear that s. 22 recognizes a pre-existing right to compensation. The payment for the compulsory erection of works differs from a wayleave. The towers and electric lines are maintained under compulsory powers, and the terms and conditions referred to in s. 22 are terms and conditions limiting the powers of the electricity authority, and not terms and conditions dealing with compensation. The Electric Lighting Clauses Act, 1899, s. 15, recognizes a pre-existing right to compensation. Sect. 22 of the Electricity (Supply) Act, 1919, incorporates s. 15 of the Electric Lighting (Clauses) Act, 1899, recognizing a legal right to compensation, which is given by s. 17 of the Electric Lighting Act, 1882, and nowhere else. It therefore follows that s. 22 of the Act of 1919 does not exclude s. 17 of the Electric Lighting Act, 1882. By s. 32 of the Act of 1882 "works" include electric lines, and s. 17 provides that the undertakers shall make full compensation for all damage caused by the exercise of powers in relation to the execution of works given them under the Act. The scope of s. 17 is discussed in *Shelfer* v. *City of*

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(1) [1919] A. C. 744.

(2) (1884) 14 Q. B. D. 245; affirmed in H. L. (1885) 11 App. Cas. 66.

(3) [1903] A. C. 355.

(4) [1895] 1 Ch. 287.

(5) (1877) 5 Ch. D. 328.

(6) (1881) 8 Q. B. D. 86.

London Electric Lighting Co. (1) If s. 22 gives powers to erect electric lines over private land the position of the electric lighting undertakers is analogous to that of a gas company, and the defendants are entitled to compensation: *Normanton Gas Co.* v. *Pope and Pearson, Ld.* (2) Cf. *London and North Western Ry. Co.* v. *Evans.* (3)

The measure of compensation under the Lands Clauses Acts may be larger than under s. 17 of the Act of 1882. By s. 1 of the Lands Clauses (Consolidation) Act, 1845, that Act incorporated itself in any Act which authorized an undertaking and the purchase or taking of any land for the purpose of the undertaking. There is here an "undertaking," and, in view of the size and construction of the towers, there has been a physical taking of land. But even if what is created is only an easement, an easement is land within the meaning of the Lands Clauses Acts. See also Acquisition of Land (Assessment of Compensation) Act, 1919, s. 12, sub-s. 2; *Thurrock Grays and Tilbury Joint Sewerage Board* v. *Thames Land Co.* (4); *Great Western Ry. Co.* v. *Swindon and Cheltenham Extension Ry. Co.* (5); *Hill* v. *Midland Ry. Co.* (6) It is not correct for the Minister to appear as plaintiff in the action. He is functus officio. He is not entitled to ask for a declaration in a matter in which he has no longer any interest: *Guaranty Trust Co. of New York* v. *Hannay & Co.* (7)

Sir William Jowitt, A.-G. in reply. The Lands Clauses Acts do not apply, because s. 22 has provided a special method of arriving at the compensation. The section is taken from the Telegraph (Construction) Act, 1916 (6 & 7 Geo. 5, c. 40), s. 1, which was construed in *Postmaster-General* v. *Brooks.* (8) In the Telegraph Act, 1878 (41 & 42 Vict. c. 76), the word "terms" was qualified by the words "pecuniary or other," but those words add nothing to the word "terms," because every term must be a pecuniary or a non-pecuniary term.

Cur. adv. vult.

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(1) [1895] 1 Ch. 287.
(2) (1883) 52 L. J. (Q. B.) 629.
(3) [1893] 1 Ch. 16.
(4) (1925) 90 J. P. 1.
(5) (1884) 9 App. Cas. 787, 800, 808.
(6) (1882) 21 Ch. D. 143.
(7) [1915] 2 K. B. 536, 562.
(8) [1922] 2 K. B. 176.

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1931. Dec. 21. Macnaghten J. [delivered the following judgment:] The matter in issue in this section is the right of the owners and occupiers of land to obtain pecuniary compensation in respect of the compulsory acquisition of wayleaves across their lands under sub-s. 1 of s. 22 of the Electricity (Supply) Act, 1919; and it is without doubt a matter of great public importance, affecting, as it does, the powers and duties of the Minister of Transport on the one hand and the rights of private individuals on the other.

The decision of the matter depends entirely on the meaning and effect of s. 22 of that Act. On the one side it is said that upon the true construction of that section a landowner is entitled as of right to compensation and that the amount of the compensation must be determined by an arbitrator appointed for the purpose. On the other side it is submitted that the section plainly imposes upon the Minister of Transport, and on him alone, the duty of deciding whether any, and, if any, what compensation should be paid. No one who has been privileged to hear the arguments addressed to me can fail to realize that the provisions of the section are ambiguous and that there is ample scope for discussion with regard to their true meaning.

Before considering the precise terms of the section it is necessary to state briefly the facts which have given rise to the present dispute. [His Lordship stated the facts as set out above and continued:] At the close of the argument for the defendants, objection was taken on their behalf that the action brought by the Minister of Transport against them was not maintainable. In view, however, of the fact that the defendants had not opposed the making of the consolidation order, and the further fact that by their counterclaim they asked for a declaration against the Minister of Transport, I was of opinion that it was not open to the defendants to take the objection. It is certainly very desirable in the public interest and of great assistance to the Court that in a matter of this importance, affecting the powers and duties of the Minister of Transport, the Law Officers of the Crown should be heard on his behalf.

Having now stated the relevant facts I turn to the consideration of the contentions which are put forward on the one side and on the other.

The defendants claim that they are entitled as of right to pecuniary compensation in respect of the wayleaves which the Joint Authority have acquired compulsorily over their lands, and that any dispute with regard to the amount of the compensation must be referred to an official arbitrator under the Acquisition of Land (Assessment of Compensation) Act, 1919. By s. 17 of the Electric Lighting Act, 1882—an Act which is to be read as one with the Electricity (Supply) Act, 1919—it is provided that: "In the exercise of the powers in relation to the execution of works given them under this Act, or any license, order, or special Act, the undertakers shall cause as little detriment and inconvenience and do as little damage as may be, and shall make full compensation to all bodies and persons interested for all damage sustained by them by reason or in consequence of the exercise of such powers, the amount and application of such compensation in case of difference to be determined by arbitration." By s. 1 of the Acquisition of Land (Assessment of Compensation) Act, 1919, which received the Royal Assent on August 19, 1919, it was provided that where by any statute passed before or after that date land is authorized to be acquired compulsorily by any public authority any question of disputed compensation shall be referred to and determined by one of the official arbitrators appointed under the Act. By s. 12, sub-s. 2, of the Act it is provided that for the purpose of the Act the expression "land" includes any right in, to, or over land, and the expression "public authority" means any body of persons, not trading for profit, who are authorized by any Act to carry on a public undertaking. A wayleave acquired under s. 22, sub-s. 1, of the Electricity (Supply) Act, 1919, is plainly a "right in, to, or over land," and is, therefore, "land" within the meaning of the Acquisition of Land (Assessment of Compensation) Act, 1919, and the West Midlands Joint Electricity Authority are—so say the defendants—a public authority within the meaning

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of that Act. The defendants base their claim on the provisions of s. 17 of the Electric Lighting Act, 1882, and on the "canon of construction"—as it was called by Lord Atkinson in the *Central Control Board* (*Liquor Traffic*) v. *Cannon Brewery Co., Ld.* (1)—that an intention to take away or interfere with the property or rights of a subject without giving to him a legal right to compensation for the loss thereby sustained is not to be imputed to the Legislature unless such intention is expressed in clear and unequivocal language. They contend that there is nothing in s. 22, sub-s. 1, of the Electricity (Supply) Act, 1919, to take away or affect the right to compensation given to them aliunde. In support of the contention that their claim to compensation comes within the provisions of s. 17 of the Electric Lighting Act, 1882, Mr. Tyldesley Jones, on behalf of the defendants, referred to the cases decided under somewhat similar provisions contained in s. 308 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), and s. 6 of the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15): *In re Dudley Corporation and Earl of Dudley's Trustees* (2); *Roderick* v. *Aston Local Board* (3); and *Normanton Gas Co.* v. *Pope and Pearson, Ld.* (4)

The Attorney-General, on behalf of the Minister of Transport, does not dispute that a wayleave acquired under s. 22, sub-s. 1, of the Electricity (Supply) Act, 1919, is "land" within the meaning of the Acquisition of Land (Assessment of Compensation) Act, 1919, and he also conceded that I am bound to adopt the reasoning of Peterson J. in the *Metropolitan Water Board* v. *Berton* (5), and that I must therefore hold that the West Midlands Joint Electricity Authority is a "public authority" within the meaning of that Act, though he reserved the right to argue in the Court of Appeal that the reasoning and decision of Peterson J. were erroneous, and that the Joint Authority is not a "public authority" within the meaning of the Act. Nor did the Attorney-General dispute the "canon of construction" on which the defendants rely; he agreed that in the case of the compulsory acquisition of a wayleave under s. 22, sub-s. 1, the Legislature intended that the landowner should receive fair compensation. His case was that although s. 22, sub-s. 1, does not, in express terms, say anything at all about compensation, nevertheless, if you read the sub-section carefully, you will find that it does provide for the payment of compensation to be assessed, not by an arbitrator, but by the Minister of Transport himself; and he submitted that none of the other statutes on which the defendants rely have any application to the case. With regard to the Acquisition of Land (Assessment of Compensation) Act, 1919, he pointed out that that Act received the Royal Assent on August 19, 1919, whereas the Electricity (Supply) Act, 1919, did not receive the Royal Assent until December 23, 1919. If, therefore, there be repugnancy between these two Acts with regard to the manner in which the compensation payable to the landowner ought to be assessed, then on the principle laid down by Lord Tenterden in *Rex* v. *Middlesex JJ.* (1) (a case cited with approval by Lord Atkinson in the *British Columbia Electric Ry. Co.* v. *Stewart* (2), where it is misnamed as *Moore* v. *Robinson*), the later Act must prevail over the earlier one. He also suggested that in view of the provision contained in s. 12, sub-s. 2, of the Electricity (Supply) Act, 1919—namely, "This Act shall, in relation to every joint electricity authority, be deemed to be a special Act for the purposes of the Electric Lighting Acts"—the decision of the House of Lords in the *Blackpool Corporation* v. *Starr Estate Co.* (3), where it was held that the provisions in the special Act which was in question in that case excluded the provisions contained in the Acquisition of Land (Assessment of Compensation) Act, 1919, could be invoked in support of his argument in so far as that decision was based on the maxim "Generalia specialibus non derogant."

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(1) [1919] A. C. 744, 752.

(2) 8 Q. B. D. 86.

(3) 5 Ch. D. 328.

(4) 52 L. J. (Q. B.) 629.

(5) [1921] 1 Ch. 299.

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(1) (1831) 2 B. & Ad. 818. (2) [1913] A. C. 816, 828.
(3) [1922] 1 A. C. 27.

The argument that s. 22, sub-s. 1, of the Electricity (Supply) Act, 1919, does in fact provide for the payment of compensation in respect of the compulsory acquisition of a wayleave thereunder runs thus: Where the landowner within twenty-one days after service of the notice of intention to place an electric line across his land fails to give his consent or attaches to his consent any terms or conditions or stipulations to which the joint electricity authority or the undertakers object, then, and in that case, the Minister of Transport may give his consent "subject to such terms, conditions, and stipulations as he thinks just." The words "terms, conditions, and stipulations" are unqualified, and therefore they must include "pecuniary" as well as other terms. It is obvious that they must bear that meaning, said the Attorney-General, because the sub-section contemplates that the landowner may attach terms or conditions or stipulations to his consent, and the pecuniary terms are the very terms which the landowner would surely attach to his consent; and if the word "terms" includes "pecuniary terms" in one part of the sub-section it must bear the same meaning in another part of it. Moreover, the provisions of s. 11 of the Electricity Supply Act, 1922, indicate that the Legislature must have supposed that the word "terms" in s. 22, sub-s. 1, of the 1919 Act, included pecuniary terms, because by that section it is provided that where an electric line has by agreement been placed over any land and the agreement has terminated, the electricity authority, in the circumstances stated in that section, may apply to the Minister of Transport for a revision of the terms and conditions which were contained in the agreement, and the terms which the Minister is authorized to revise must certainly include pecuniary terms.

Then it was pointed out that the primary object of the Electricity (Supply) Act, 1919, was to secure the provision of a cheap and abundant supply of electricity throughout the country, and that if the Minister of Transport has to settle the terms and conditions on which a wayleave should be granted, and then an arbitrator has to settle what compensation ought to be paid in respect thereof, the expense would be considerably increased, and that the Legislature may well have thought that it would be much simpler and cheaper and therefore much better to entrust to the Minister alone the duty of deciding not only the question whether a wayleave should be granted, but also the question what compensation ought to be paid in respect of it. As I understood them, such in brief were the arguments advanced in support of the contention put forward on behalf of the plaintiffs. It certainly is remarkable that the Legislature, if it was intended that the Minister should settle the pecuniary compensation payable to the landowner, should have refrained from saying so in express terms. It would have been so simple to have said that the Minister might give his consent subject to such pecuniary and other terms as he might think just, if that was really meant, and perhaps an inference adverse to the contention of the Attorney-General may properly be drawn from the following fact. The phraseology of s. 22, sub-s. 1, is apparently taken from s. 3 of the Telegraph Act, 1878, which provides that: "Where any body or person (within the meaning of the Telegraph Act, 1863 (26 & 27 Vict. c. 112)) having power under the said Act to give or withhold their consent to the Postmaster-General placing telegraphs and posts in under along over or across a street or public road," and so forth, "fail within twenty-one days after being required to do so by the Postmaster-General to give their consent or attach to their consent any terms, conditions, or stipulations to which the Postmaster-General objects . . . ., a difference shall be deemed to have arisen between the Postmaster-General and such body or person, ... and that difference shall be determined in manner hereinafter provided, and the authority by whom the difference is to be determined may, if after hearing all parties concerned they think it just, give their consent either unconditionally or subject"—here come the important words—"to such pecuniary or other terms, conditions, and stipulations as they may think just." If the phraseology of s. 22 of the Electricity (Supply) Act, 1919, was really borrowed from that of s. 3 of the Telegraph Act, 1878, the omission of the words "pecuniary or other" seems to be significant. The Attorney-General suggested that the words were omitted because the draughtsman of the later Act was a good draughtsman and omitted unnecessary words as otiose. That may be so; but, if that was the case, it is to be observed that the draughtsman soon wearied in well doing, because he continued to repeat the words "terms, conditions, and stipulations" when it seems plain that the single word "terms" would have been quite sufficient for the purpose.

And further, even if the words "terms, conditions, and stipulations" ought to be read as including "pecuniary terms, conditions, and stipulations," it is to be noted that the Minister of Transport is under no obligation to attach any terms, or conditions, or stipulations, at all. The Act says that he may give his consent "unconditionally," which must, I take it, mean that he simply assents to the placing of the proposed electric lines over the lands in question. The sub-section requires that the electricity authority should serve notice of intention to place the electric line across the land in question, together with a description of the nature and position of the lines proposed to be so placed. They are under no obligation to offer any terms to the landowner. If the electricity authority merely serves the required notice, and the landowner having failed to give his consent within twenty-one days after the service of the notice, the Minister thereupon gives his consent unconditionally, it seems clear, according to the argument of the Attorney-General, that the landowner would receive no compensation; indeed, the Attorney-General admitted that on his construction of the section the Minister would be at liberty in any, and therefore in every case, to refuse compensation, though he expressed the opinion that the cases in which the Minister would take that course must be very rare and exceptional. It is one thing to give a right to compensation enforceable at law, and it is another thing to give compensation at the discretion of the Minister of

Transport, and it may well be thought that the construction which the Attorney-General places upon s. 22, sub-s. 1, of the Act of 1919 offends against that " canon of construction " of the statute which he accepted as valid. If the interpretation which the Attorney-General places upon s. 22 be correct, it follows that that section is repugnant to the provisions of the Acquisition of Land (Assessment of Compensation) Act, 1919. Here, again, it is somewhat remarkable that if the Legislature intended that the provisions of that Act should not apply to a claim for compensation in respect of the compulsory acquisition of a wayleave they did not say so in express terms; it would have been quite simple to provide not only that the Minister might attach pecuniary terms to his consent, but also that he and he alone should determine whether any, and if any, what, compensation ought to be paid, and that the Acquisition of Land (Assessment of Compensation) Act, 1919, should not apply.

If the sub-section in question had in express terms imposed on the Minister of Transport the duty of deciding what compensation, if any, should be awarded to the landowner, it would, of course, be impertinent to inquire whether the Minister was really in a position to discharge that duty, but since this duty is said to have been imposed upon him by implication it is, I think, relevant to consider that question. It cannot, of course, be supposed that the Minister himself could assess the compensation; he would of necessity be obliged to delegate that matter to one or other of the officials of the Ministry; and there are obvious objections to the discharge of such a duty vicariously. True it is that the Minister is bound to give the parties concerned —and the landlord is certainly a party concerned—an opportunity of being heard, but the person who is selected by the Minister to hear what the landowner has to say need not be the person selected by him to decide whether any and what compensation should be paid. In that case you would get one person hearing the evidence and arguments and another person giving the decision.

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Even if the Minister delegates to the same official the duty of hearing the parties and also the duty of deciding what compensation should be paid, there is no guarantee that the official chosen for the task will possess the qualifications necessary for arriving at a just decision. He, no doubt, would be a gentleman of skill and experience in all matters appertaining to the transmission of electricity, and well qualified to form an opinion as to what terms or stipulations ought to be attached to the Minister's consent; but it by no means follows that he would combine with those qualifications the special qualifications necessary for a just assessment of compensation. In truth the functions of the Ministry of Transport are administrative and not judicial, and the mischief arising when judicial or quasi-judicial functions are imposed upon an administrative body, is well illustrated by what actually happened in this case. It appears from the correspondence, which has been put in evidence, that on February 20, 1930, after it was known that the question at issue between the Joint Authority and the defendants was the amount of the compensation which ought to be paid, the clerk to the Joint Authority wrote to the secretary of the Ministry of Transport urging that, for the reasons therein set out, the Ministry ought to reject the claim of the defendants for any greater compensation than that which the Authority were willing to give. I presume that the clerk to the Joint Authority would have realized the impropriety of addressing any such communication behind the back of the other side to any judicial or quasi-judicial tribunal such as an arbitrator, but he obviously did not see anything improper in writing such a letter to the Ministry of Transport. I was told that the letter was disclosed under the order for discovery in this action, and that until then the defendants were not aware that any such letter had been written. Whether that letter did or did not influence the decision of the gentleman to whom the Minister delegated the duty of deciding the matter is quite immaterial. Where one party is permitted to make representations to the tribunal

—whether it be a Court of justice, or an arbitrator, or the Minister of Transport—without the knowledge of the other party, it is not possible to obtain even-handed justice.

Consideration of s. 22, sub-s. 2, of the Electricity (Supply) Act, 1919, also leads to a conclusion adverse to the Attorney-General's contention. Where electric lines are placed across or along a railway or canal the compensation payable in respect thereof is to be assessed in some cases by an arbitrator and in some cases by the Railway and Canal Commission. If Parliament intended the Minister of Transport to decide whether any and what compensation should be paid in the case of private individuals, there does not seem to be any valid reason why any different provision should have been made with regard to railways and canals. Indeed it might be thought that, if there was any case in which the Minister would be a suitable tribunal for that purpose, it would be the case of public undertakings such as railways and canals.

After giving full weight to all the arguments adduced by the Attorney-General, I come to the conclusion that on the true construction of s. 22, sub-s. 1, the assessment of the compensation payable to the landowner is not within the province of the Minister of Transport. I think that the words "terms, conditions, and stipulations" in that sub-section do not mean or include pecuniary terms. In my opinion it is for the Minister to consider whether the proposal to place an electric line across any land should be sanctioned, and, if he is of opinion that it should be sanctioned, he is then to consider what terms (other than pecuniary terms) ought to be attached to his consent. It is not for him to decide what compensation the landowner ought to receive. It was pointed out that s. 22 enables, not only a public authority within the meaning of the Acquisition of Land (Assessment of Compensation) Act, 1919, but also undertakers, such as power companies, who are not public authorities within the meaning of that Act, to acquire wayleaves under that section and that in such a case the arbitrator would be an arbitrator appointed by the Minister of Transport under

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s. 28 of the Electric Lighting Act, 1882. I do not think any difficulty arises from that fact. The Minister of Transport would no doubt, as required by that Act, appoint a fit person, and if, in the case of a public authority, the compensation had to be assessed by an official arbitrator, it is probable that the Minister would select one of the official arbitrators in the case of an undertaker who is not a public authority.

Mr. Tyldesley Jones, on behalf of the defendants, based his claim, as I understood it, upon the Lands Clauses Consolidation Act, 1845, as well as on s. 17 of the Electric Lighting Act, 1882. He maintained that the so-called wayleave was in fact a "taking of land" within the meaning of the Lands Clauses Consolidation Act, 1845; and, further, even if it did not amount to a "taking of land," it was an easement in which the dominant tenement would be the generating station where electricity is generated, and the servient tenement would be the land over which the electric line was placed. Having regard to the area occupied by the towers I am disposed to think that the wayleave in question ought to be regarded as a "taking of land." The decision in the case of *Escott* v. *Newport Corporation* (1) was that the placing of a pole in the pavement of a public street was not a taking of any of the land of the person in whom the ownership of the land was vested. That decision does not seem to me to cover the case of towers such as there are in this case. But be that as it may, it seems to me that there is a difficulty in holding that the Lands Clauses Consolidation Act, 1845, applies to the claim put forward by the defendants. Sect. 12 of the Electric Lighting Act, 1882, incorporates the Lands Clauses Consolidation Act, 1845, except the enactments with respect to purchase and taking of lands otherwise than by agreement. That Act and the Electricity (Supply) Act, 1919, are to be read together as one Act. Where an Act expressly incorporates a portion of the Lands Clauses Consolidation Act, 1845, it cannot, I think, be held that other parts of the Act are also incorporated by implication, or that the principle adopted in the *Central Control Board* (*Liquor Traffic*) v. *Cannon Brewery Co., Ld.* (1) applies.

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(1) [1904] 2 K. B. 369.

There is one other matter that should be mentioned. It was urged by the Attorney-General that if the claim of the defendants be referred to arbitration the arbitrator would have no power to award an annual rental, he would be bound to award a lump sum by way of compensation. Mr. Tyldesley Jones, on behalf of the defendants, accepted that view. It seems to me, however, that there are good grounds for thinking that it would be within the power of the arbitrator to award an annual rental for the wayleaves, and that in some cases at least it would be just both to the landowner and to the authority to do so, as was suggested by Lush J. in the case of *Postmaster-General* v. *Brooks.* (2) The Authority may seek to obtain, and the Minister may give his consent to, a perpetual wayleave, and in such a case a lump sum may be the proper compensation payable. But the Authority may only seek to obtain a wayleave for a period terminable at the option of the Authority, or at the option of the landowner; and in the case of such a wayleave it is difficult to see how the arbitrator could award a lump sum without injustice either to the Authority or to the landowner, since at the time of the arbitration it cannot be known how long the wayleave will be continued. An annual rental rather than a lump sum seems to be appropriate in such a case. As the point was not argued I express no concluded opinion upon the matter.

In my view the defendants were right in maintaining that their claim to compensation ought to be assessed by Mr. Willmot, and I think that a declaration should be made as asked for in the counterclaim. I think the terms of the declaration should be as follows: Declare that the claims of the several defendants in respect of the wayleaves across their lands acquired by the West Midlands Joint Electricity Authority under s. 22, sub-s. 1, of the

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(1) [1919] A. C. 744.

(2) [1922] 2 K. B. 176.

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Electricity (Supply) Act, 1919, ought to be determined by arbitration pursuant to the provisions of the Electric Lighting Act, 1882, and the Acquisition of Land (Assessment of Compensation) Act, 1919. The defendants are entitled to the costs of this action.

Judgment for defendants.

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The Minister of Transport and the Joint Electricity Authority appealed. There was a cross-appeal by the defendants, raising the question whether the Lands Clauses Consolidation Act, 1845, applied to the defendants' claim for compensation. The appeal and cross-appeal were heard on February 17 and 18 and judgment given on March 22, 1932.

Sir T. Inskip A.-G., Craig Henderson K.C., and *Bowstead* for the Minister of Transport.

Sydney Turner K.C. and *J. Hodson* for the Joint Electricity Authority.

Tyldesley Jones K.C. and *A. M. Trustram Eve* for the defendants.

In the course of the arguments the following additional cases were referred to: *Ferrar* v. *Commissioners of Sewers of London* (1); *In re National Savings Bank Association* (2); *Cowper Essex* v. *Acton Local Board* (3); *Brown* v. *Dean* (4); *Vauxhall Estates, Ld.* v. *Liverpool Corporation* (5); *Reg.* v. *St. Luke's, Chelsea* (6); *Manchester Corporation* v. *Farnworth* (7); *Pinchin* v. *London and Blackwall Ry. Co.* (8); *Metropolitan Ry. Co.* v. *Fowler* (9); *Bentley* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (10); *Jary* v. *Barnsley Corporation.* (11)

Cur. adv. vult.

(1) (1869) L. R. 4 Ex. 227.
(2) (1866) L. R. 1 Ch. 547.
(3) (1889) 14 App. Cas. 153.
(4) [1910] A. C. 373.
(5) [1931] W. N. 259.
(6) (1871) L. R. 7 Q. B. 148.
(7) [1930] A. C. 171.
(8) (1854) 5 D. M. & G. 851.
(9) [1893] A. C. 416.
(10) [1891] 3 Ch. 222.
(11) [1907] 2 Ch. 600.

1932. March 22. LORD HANWORTH M.R. This is an appeal from a decision of Macnaghten J. dated December 21, 1931, whereby he gave judgment for the defendants on the claim and on the counterclaim.

The first above named action was brought by writ dated August 2, 1930, and the second by writ dated January 30, 1931, and the two actions were consolidated by an order dated March 24, 1931. The statement of claim delivered in the consolidated action prayed on behalf of both the plaintiffs that a declaration should be made that the Minister of Transport—as successor to the Board of Trade—in giving his consent under s. 22 of the Electricity (Supply) Act, 1919, to the placing of an electric line across any land is entitled to give such consent subject to a term, condition, or stipulation as to the monetary payment to be made by a Joint Electricity Authority in respect of the wayleaves for such line.

There were other claims for declarations that the four several consents made by the Minister on May 30, 1930, at the instance of the plaintiff Authority, enabling them to place certain electric lines across the lands of the defendants, were valid, and justified action being taken accordingly by the Authority, and also that the official arbitrator under the Acquisition of Land (Assessment of Compensation) Act, 1919, had no jurisdiction to determine any question as to the compensation to be paid for the wayleaves for such electric lines.

The main question, however, that was determined in the action, and to be determined in this Court, is whether the Minister of Transport has power under s. 22, incidentally, by imposing an appropriate condition, to settle what is the monetary payment to be made by the plaintiff Authority to the defendants as compensation, in respect of the right over the defendants' land given to the Authority by the consent of the Minister.

It is unnecessary to repeat the facts and preliminaries to the proceedings before Macnaghten J., for they have been sufficiently stated by him.

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It is clear from that statement that it is not a mere wayleave or licence which is given by the Minister over the defendants' land. The powers granted have been exercised and thirty-three towers have been erected on the lands belonging to the several defendants, the total area occupied by these towers being some 10,643 square feet; and, as Macnaghten J. observes, it is obvious that these towers themselves must interfere with the use of the defendants' fields. It is not the mere occupation of surface from which an interference with the defendants' property can be gauged, but the necessary user of the approaches for repairs or alterations must not be overlooked, even if the compensation is to be settled at the outset, once for all.

The actual consents given in this case by the Minister appear to follow a form of consent which has been made use of in many cases by owners and occupiers, subject to this, that the right of withdrawal of the consent upon giving twelve months' previous notice contained in these forms and numbered four in each of them, was eliminated, and the Minister reserved to himself the power to review this consent at any time after a lapse of something more than four years; in actual date, after October 16, 1934.

The decision now to be given is no doubt important, for it affects a large number of cases where rights are required to erect what are called pylons and to carry electric lines across lands in the areas which have been allotted to various authorities for the development and provision of electrical power. It is not suggested that the authorities are to acquire these rights without paying for them. The principle of *Attorney-General* v. *Horner* (1) and other cases is fully accepted—namely, that there is a legal right to be paid compensation; but the contention is that s. 22 provides a short and easy method whereby compensation can be assessed and given without the troublesome, and possibly prolonged, procedure of an arbitration.

The question lies within a narrow compass. Does s. 22 in its reference to "terms, conditions, and stipulations as they [now he] think just," include the settlement of this compensation ?

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(1) 14 Q. B. D. 245; 11 App. Cas. 66.

It is well to remember that others beside the owner and occupier of the land upon which these pylons may be ordered to be erected may be injuriously affected.

A contiguous owner may have to give support to the land in which the pylon is erected : see *In re Dudley Corporation and Earl of Dudley's Trustees* (1) and *Normanton Gas Co.* v. *Pope and Pearson, Ld.* (2) ; and see *London and North Western Ry. Co.* v. *Evans.* (3)

Next, the section itself contemplates that consent may be given unconditionally, and although the Attorney-General called our attention to the words "as they think just," and rightly said that the Court ought not to presume that any injustice would be done by any one entrusted to exercise these powers, the words seem inappropriately placed in a clause which is to enable compensation to be awarded for rights acquired or lands taken.

The last clause of sub-s. 1 must be noticed when attention is directed to "the effect, if any, on the amenities or value of the land of the placing of the line in the manner proposed." They seem to point to the purpose of the section being to determine difficulties which may arise as to the nature and position of the lines proposed, the possibility of an alternative and less unsightly route and the like, rather than to compensation.

The Attorney-General called attention to the earlier part of the proviso, and claimed that as one of the terms which the owner and occupier may attach to their consent may be, and in practice in many cases will be, a condition requiring a money payment, so in the later part of the same clause "terms" must also include a money payment. I do not find this argument conclusive. The demand may be made for a sum to be paid by way of compensation which the undertakers regard as exorbitant, and the response may be that the Minister's consent is given subject to a proper sum being determined by arbitration and paid to the owner or occupier whose demand is not admitted.

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(1) 8 Q. B. D. 86.

(2) 52 L. J. (Q. B.) 629.

(3) [1893] 1 Ch. 16, 17.

That is a term which may be imposed. But I cannot think that the section is to be read as ancillary, or an alternative to s. 17 of the Act of 1882, which deals with compensation, and which I refer to more particularly later on, merely because the words in one part of the section may well have a reference to a demand for a specific sum of money.

The observations of Lord Blackburn in *Edinburgh Street Tramways Co.* v. *Torbain* (1) are relevant to this point.

Sect. 22 is precise in its terms. Sub-s. 2 (*a*) imposes conditions as to the power of placing lines across or along any railway, canal, dock or harbour; and s. 15 of the Electric Lighting (Clauses) Act, 1899, is applied, which in terms refers to the compensation to be paid in the exercise of the works contemplated under that Act. Sub-s. 2 (*c*) (i) excludes the proviso to sub-s. 1 and runs: "make an order for the placing of the electric lines, subject to such pecuniary terms as the Commission think just." Further, s. 23, which deals with the supply of fittings, apparatus and appliances, in terms provides that the Authority "may demand and take such remuneration or rents and charges, and make such terms and conditions, as may be agreed upon."

The obvious comment arises that where the statute refers to compensation or pecuniary terms it uses explicit words, and in the latter instance given it deals with remuneration as distinct from other terms.

These comments might not be of the same weight if there were no provision for assessing compensation, and it was necessary to presume that somewhere in the statute there was a provision for compensation to be paid—implied if not explicit—following the observation of Sir Baliol Brett M.R. in *Attorney-General* v. *Horner*. (2) But that difficulty does not arise here. It is possible to construe the words of s. 22 as referring to terms, conditions and stipulations which may or may not be required, according to the circumstances of the case—if not required the consent may be given without them—and not to the cases where some compensation, even if trifling, or only sufficient to keep open the right to it, ought in all cases to be given.

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(1) (1877) 3 App. Cas. 58, 68.

(2) 14 Q. B. D. 245, 257.

The several Acts dealing with Electrical Lighting and Supply are by s. 40 of the Act of 1919 to be construed together, and the same rule is to be found in s. 31 of the Act of 1922, with the result that the Acts for the forty years, 1882 to 1922, whether for lighting or supply, are to be construed as one Act, and later the Act of 1926 was added to the sequence.

Full compensation is required by s. 17 of the Act of 1882 to be given to all persons for all damage sustained by them, "by reason or in consequence of the exercise of such powers, ... in case of difference to be determined by arbitration"; and s. 28 provides that for the purpose of an arbitration a fit person is to be nominated by the Board of Trade —now the Minister of Transport. It is not contended by the Attorney-General that s. 17 does not apply. What is argued is that, in addition to the rights given to the person who suffers damage, there is also power given to the Minister to determine the payment to be made under s. 22, and that if that determination is made by the Minister the rights given by s. 17 cannot be invoked. The only limitation that the Attorney-General contends for under s. 17 is that it is not to include damage for user in accordance with the authority of *Shelfer* v. *City of London Electric Lighting Co.* (1)

Reading the statutes as a comprehensive whole, I cannot find any necessity to read into the proviso to s. 22, sub-s. 1, the power for which the Attorney-General contends, and the terms of the other sub-sections of s. 22 afford a contrast to any such inclusive meaning being intended in the proviso.

It is involved in this conclusion that there is no necessity to seek the assistance of the Lands Clauses Consolidation Act for the purpose of finding a system of compensation. Sect. 17 and s. 28, with its provision of a mode of appointment of an arbitrator, meet the case.

(1) [1895] 1 Ch. 287.

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One other matter must be referred to, although it was not fully argued and cannot, therefore, be decided in the present case. That is that a question has been raised, and it seems by no means an easy one, whether the Minister of Transport can bring an action for a declaration such as he seeks in the present case. I will not discuss it, but it is right to point out that this judgment cannot be quoted as an authority that he is able to do so.

For these reasons, in addition to those contained in the judgment of Macnaghten J., with which I agree, I am of opinion that he came to a right decision and that the appeal must be dismissed with costs.

Upon the question of the application of the Acquisition of Land (Assessment of Compensation) Act, 1919, I also agree with Macnaghten J. and with the observations made by Slesser L.J., which I have had an opportunity of reading, to which I do not desire to make any addition.

The cross-appeal on behalf of the defendants in the action, therefore, fails and must be dismissed with costs.

SLESSER L.J. Although the matter which falls to be decided in this appeal is one of very considerable importance, the issues which the case raises fall within a narrow compass.

The Minister of Transport and the West Midlands Joint Electricity Authority (a statutory body constituted by an order of the Minister of Transport made under s. 7 of the Electricity (Supply) Act, 1919) have sought from the Court a number of declarations, the effect of which is to state that the Minister, in giving his consent to the compulsory placing of an electric line across land, is entitled in giving such consent to attach a term as to the amount of monetary payment (if any) to be made by the Joint Electricity Authority, or, in some cases, undertakers who wish to place an electric line across land, to the owners or occupiers of the land. I do not set out the declarations in extenso, but this I conceive to be the substance of the declarations sought.

The case turns upon a proper interpretation of s. 22, sub-s. 1, of the Electricity (Supply) Act, 1919. The first part of the section is enabling, and gives power to a Joint Electricity Authority or any authorized undertakers to place an electric line below ground across any land, and above ground across any land other than land covered by buildings or used as a garden or pleasure ground. So far no question arises, but the problem which we have to consider lies in the construction of the proviso which follows this power so compulsorily to place electric lines across land. This proviso is in the following terms: "Provided that, before placing any such line across any land, the joint electricity authority or undertakers shall serve on the owner and occupier of the land notice of their intention, together with a description of the nature and position of the lines, proposed to be so placed; and if, within twenty-one days after the service of the notice, the owner and occupier fail to give their consent or attach to their consent any terms or conditions or stipulations to which the joint electricity authority or the undertakers object, it shall not be lawful to place the line across that land without the consent of the Board of Trade; and the Board of Trade may, if after giving all parties concerned an opportunity of being heard they think it just, give their consent either unconditionally or subject to such terms, conditions, and stipulations as they think just; and in deciding whether to give or withhold their consent, or to impose any terms, conditions, or stipulations (including the carrying of any portion of the line underground) the Board shall, among other considerations, have regard to the effect, if any, on the amenities or value of the land of the placing of the line in the manner proposed."

It will be observed that this proviso, broadly speaking, has two limbs. The first provides that the Joint Electricity Authority or undertaker must serve on the owner and occupier of the land notice of their intention to place the line across the land with a description of the nature and position of the proposed lines; on this the owner or occupier may, within a prescribed period, either consent or "attach to their consent any terms or conditions or stipulations." If the Authority or undertaker object to these terms,

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conditions, or stipulations, they cannot place the line across the land without the consent of the Minister of Transport. In the present case the defendants did attach conditions to their consents, some of which were of a financial nature. They demanded wayleave rentals on the following scale :—

	Arable land.	Grass land.	Other land.
Per steel tower	40*s.*	40*s.*	40*s.*
Per half sections of steel tower.	20*s.*	20*s.*	20*s.*

This schedule of annual rentals was higher than that which the Joint Electricity Authority had offered, their offer having been as follows :—

Overhead Conductors.	Arable land.	Grass land.	Other land.
Per steel tower	16*s.*	8*s.*	4*s.*
,, half-sections of steel tower	8*s.*	4*s.*	2*s.*
,, A. or H. Pole . . .	8*s.*	4*s.*	2*s.*
,, single pole	4*s.*	2*s.*	1*s.*
,, stay.	6*d.*	6*d.*	6*d.*
Underground Cables.			
Per 100 yards of trench, all classes of land			1*s.*

In addition the defendants required an owner's condition to which their consent was sought—namely : "If any dispute or difference shall arise between the Authority and the owner in respect of the said electric lines, such dispute or difference shall be referred for settlement to the Minister of Transport whose decision shall be final," to be amended, so as to provide that any dispute should be referred for settlement to a single arbitrator appointed by the Surveyors' Institute.

The Joint Authority told the defendants that they were not prepared to agree to the increased rentals, though they indicated that they might possibly have accepted the modification as to the arbitration.

On these facts the matter fell under the second limb of the proviso to the section, which is to the effect that (it having been provided, as I have said, that it would not in these circumstances be lawful to place the lines across the land without the consent of the Minister of Transport), the "Board of Trade" (now the Minister of Transport) "may, if after giving all parties concerned an opportunity of being heard they think it just, give their consent either unconditionally or subject to such terms, conditions, and stipulations as they think just." On April 30, 1930, an inquiry was held at Bridgnorth by an inspector on behalf of the Minister of Transport, at which all parties concerned were given an opportunity of being heard. The defendants were represented by counsel, who stated that he was merely watching on behalf of his clients, and stated that, in so far as the inquiry concerned compensation, his clients had a right to have it dealt with, not under the Electricity (Supply) Acts but under the Acquisition of Land Act, 1919.

Notwithstanding this submission the inquiry proceeded, and the Minister of Transport, on October 16, gave his consent to the placing of the electric lines over the lands of the defendants, and, among other matters, attached as a term and condition to his assent a pecuniary term that the Authority should pay to the owner certain annual sums as rental for the wayleave as follows: (*a*) In respect of the said electric lines placed above ground on the said lands of the owner for each tower erected or stay placed on such lands: (i.) A sum of twenty shillings per tower with base exceeding thirteen feet square, a sum of sixteen shillings per tower with base not exceeding thirteen feet square, and a sum of four shillings per stay being on arable land. (ii.) A sum of ten shillings per tower with base exceeding thirteen feet square, a sum of eight shillings per tower with base not exceeding thirteen feet square, and a sum of two shillings per stay being on mowing grass land. (iii.) A sum of five shillings per tower with base exceeding thirteen feet square, a sum of four shillings per tower with base not exceeding thirteen feet square, and a sum of sixpence per stay being elsewhere. (*b*) In respect of the said electric lines placed below ground across the said lands of the owner a sum of one

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shilling for each one hundred yards or part thereof of the route of such lines, such sums to be paid in advance on the first day of April in each year, and that on the erection of each tower or the placing below ground of each one hundred yards or part thereof of the route of such electric lines a proportion of such annual payment applicable to the period up to the first day of April next succeeding shall immediately become payable.

He modified the original offer, condition 4 of the Joint Electricity Authority, that the consent might be withdrawn by the owner upon giving to the Authority twelve months' notice, and substituted a power in himself to review the consent at any time after October 16, 1934, so that the owner remained without any power at any time to withdraw. He also modified provision 8 in the original proposed consent of the Joint Electricity Authority, that disputes should be referred to the Minister of Transport for settlement, and substituted the following: "Provided that if any dispute or difference shall arise between the Authority and the Owner or Occupier of the said lands under the said standard forms of Wayleave Agreement such dispute or difference shall be referred for settlement to a single arbitrator appointed by the Surveyors' Institute, whose decision shall be final, and the provisions of the Arbitration Act, 1889, shall apply to such reference."

The declarations sought do not concern immediately these two latter modifications with regard to the arbitration or the right of the owner to withdraw, but the declarations are concerned with the pecuniary terms which the Minister has thought fit to attach to his consent, providing for the payment of moneys by the Electricity Authority as rentals for the wayleaves of annual sums which I have above read out.

The defendants contend that the Minister, in attaching pecuniary terms for what is in effect compensation for placing these lines and necessary towers which support the lines and for occupying part of the land, is doing something beyond his statutory authority. Their argument, in substance, is this: They point out that the Electricity (Supply) Act, 1919, is but one of a series of electricity Acts dating from the Electric Lighting Act, 1882, to the Electricity (Supply) Act, 1926, and that, by s. 52 of the last-mentioned Act, that Act and its predecessors are to be construed as one. In particular, they point out that in the Act we are here to consider—namely, the Electricity (Supply) Act, 1919, it is provided by s. 40, sub-s. 2, that "this Act shall be construed as one with the Electric Lighting Acts"; so that the whole of these Acts constitute one code.

The effect of a provision that Acts shall be construed as one Act is that the Court must construe every part of each of the Acts "as if it had been contained in one Act, unless there is some manifest discrepancy, making it necessary to hold that the later Act has to some extent modified something found in the earlier Act": per Lord Selborne L.C. in *Canada Southern Ry. Co.* v. *International Bridge Co.* (1)

Treating the Acts as one, subject to the consideration mentioned by Lord Selborne, it becomes immediately apparent that the Legislature thought fit at a very early stage of the legislation to provide specifically machinery for compensation for damage caused in the exercise of powers in relation to the execution of works under the Electricity Acts. Such provision is contained in s. 17 of the Electric Lighting Act, 1882, to the following effect: "In the exercise of the powers in relation to the execution of works given them under this Act, or any license, order, or special Act, the undertakers shall cause as little detriment and inconvenience and do as little damage as may be, and shall make full compensation to all bodies and persons interested for all damage sustained by them by reason or in consequence of the exercise of such powers, the amount and application of such compensation in the case of difference to be determined by arbitration."

It will be observed that this section speaks of the execution of works "under this Act," but it is clear, having regard to the fact that the Electricity Acts are to be construed as one, that the expression "this Act" in the Act of 1882 must now be construed to mean the exercise of powers in

(1) (1883) 8 App. Cas. 723, 727.

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relation to the execution of works under the Electricity Acts generally. Where two Acts were to be read and construed together as one Act, a proviso that "nothing in this Act shall exempt the company from liability" was held to mean "nothing in the combined Acts shall so exempt them": *Read v. Joannon* (1); *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.* (2)

Although a considerable amount of time was consumed in discussing the meaning of the words "execution of works" and the subsequent words, "shall make full compensation . . . . for all damage sustained . . . . by reason or in consequence of the exercise of such powers," I do not understand the Attorney-General to dispute that if this section be applicable compensation may be properly given for all matters arising out of the execution of the works other than user, and as we are not here concerned with the quantum of such compensation or even directly concerned in the principles upon which it should be given, I deliberately abstain from dealing with this matter, which is not directly relevant to the question which we have to decide, beyond saying that, for myself, having read and considered the authorities, I think it is clear that under this section compensation may be given for damage caused by the execution of the works, but not for damage caused by their user when constructed: see *Shelfer* v. *City of London Electric Lighting Co.* (3)

The argument for the defendants proceeds in this way: They do not suggest, as I understand them, that the word "terms," which the Minister may attach to his consent, in itself of definitive necessity excludes pecuniary terms, but they say that in the context of these Acts, as the machinery for compensation has already been set up by s. 17 of the 1882 Act, the word "terms" in s. 22 of the 1919 Act has no such extended meaning, and that it is for the Minister to show that, in the language of Lord Selborne in the *Canada Southern Ry. Co.'s* case (4), "there is some manifest discrepancy, making it necessary to hold that the later Act

(1) (1890) 25 Q. B. D. 300.
(2) [1914] 3 K. B. 772.
(3) [1895] 1 Ch. 287.
(4) 8 App. Cas. 727.

has to some extent modified something found in the earlier Act." If this be not their argument, it is at any rate the way in which the problem primarily presents itself to me. Now I can find no such manifest discrepancy. I start with the fact that the Legislature has provided compensation for contemplated statutory invasions of the subject's rights. The Minister contends that, even on this view, s. 22 of the 1919 Act has also provided for compensation and in that section superseded the earlier provision. With this argument I deal later. But at any rate it is clear that in s. 17 of the 1882 Act we find unambiguous machinery for that purpose. If this be so, it would follow that the terms which the Minister may impose under s. 22 of the 1919 Act are terms authorizing the exercise of powers in relation to the execution of works, and, on such authorization, the right to compensation would arise as in s. 17 of the 1882 Act provided, and it would be beyond the Minister's power by imposing pecuniary terms to vary the Act of Parliament.

The machinery in the Electric Lighting Act of 1882 for the assessment of compensation is contained in s. 28 of the same Act, which directs that "where any matter is . . . . directed to be determined by arbitration, such matter shall, except as otherwise expressly provided, be determined by an engineer or other fit person to be nominated as arbitrator by the Board of Trade on the application of either party." Such a person appears to me to be the proper arbitrator subject to the effect of the later legislation which subsequently I discuss.

In the present case, the Minister has, without sending the matter to arbitration, himself fixed the compensation. This appears to me to be in conflict with ss. 17 and 28 of the 1882 Act, which indicate the method by which compensation is to be given, and I therefore think that what he has attempted to do is beyond his powers.

The reasons why I have come to the conclusion that s. 22 of the 1919 Act does not operate to give power to the Minister to dispense with the machinery for arbitration provided in the Act of 1882 are as follows. The Attorney-General has endeavoured to confront the Court with a dilemma. He points out, and I think rightly, that in the first limb of the proviso to s. 22, sub-s. 1, when the subject is being asked to give his consent, he may attach as a term to his consent a pecuniary demand. I think this is right, and I am with the Attorney to this extent, that the long researches into which we entered at his invitation into the use of the word "term" in the Electricity Acts, the Telegraph Acts and other Acts do show, as indeed I think any competent dictionary would show, that the word "term" may normally include terms as to pecuniary matters. But this first limb is dealing with negotiation. When we come to the consent of the Minister, he is imposing terms in invitum, and in such a case it appears to me that the existence of s. 17 does require a different connotation to be placed upon the word "term" in this latter limb, because the Legislature has already dealt in the 1882 Act with rights compulsorily taken, and to that extent has limited the power of the Minister to impose pecuniary terms in the case of compulsory invasion of rights. The Attorney-General argued that the Court will be slow to give a different meaning to the same word appearing in the same section, but, as Lord Blackburn said in *Edinburgh Street Tramways Co.* v. *Torbain* (1): "The words used with reference to" one set of circumstances "may convey an intention quite different from what the self-same set of words used in reference to another set of circumstances . . . . would or might have produced." And I cannot see why this view, which is based both upon logic and common sense, must be excluded from interpretation merely because the same words happen to fall within the same section or proviso. To my mind there is all the difference between the insertion of pecuniary terms as a matter of negotiation by the owner with the Local Authority or undertaker and the imposing of terms compulsorily for which the machinery for compensation has already been provided by the Legislature. Had the Legislature not thought fit to provide for compensation in such a case, I think that the Attorney-General's argument

(1) 3 App. Cas. 58, 68.

would have far more weight, because prima facie I agree the use of the same word in different senses in the same section may produce difficulties. But there have been cases where a word has been used in totally different senses in one section. In *In re Smith* (1) North J. said (2): "The word 'property' is in s. 54" of the Bankruptcy Act, 1869, "used in two totally different senses." So also in *Reg.* v. *Allen* (3), the language being "whosoever, being married, shall marry any other person during the life of the former husband or wife," it was pointed out by the Court that the proposition that the same effect must be given to the term "marry" in both parts of the sentence cannot possibly hold good because of the existing legislation. Thus because, if necessary, different interpretations may and ought to be given to a word in one section, the dilemma of the Attorney-General does not hold out any terror for me.

This conclusion really decides this case in favour of the defendants, but the Attorney-General has also argued that, if s. 17 of the 1882 Act is a machinery of compensation, it has been superseded by a later method in the Act of 1919; and that the terms which the Minister may impose, if they be pecuniary terms, may be in themselves a machinery for awarding compensation. He says that the fact that the Minister may give consent unconditionally is no more than a refusal of compensation after consideration of the justice of the matter in a proper case and that the authorities, which suggest that prima facie an Act shall be construed on the assumption that the Legislature intended compensation to be given for the invasion of rights, are not applicable, because here the Minister may assess compensation, but I am not sure that this is correct. The Minister may always impose as conditions to his consent what I will call physical terms only, which do not include compensation; this would certainly amount to a refusal of compensation in a particular case. But he may also give consent unconditionally. I think that if he may deny compensation by making physical conditions

(1) (1883) 24 Ch. D. 672.
(2) 24 Ch. D. 678.
(3) (1872) L. R. 1 C. C. 367, 374.

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without compensation, the power to give consent unconditionally points not so much to a consideration of the right to compensation and a refusal of it, as rather to a refusal of all conditions pecuniary or physical in giving his consent, without any consideration of the rights of the subject to any compensation at all. An unconditional consent would thus be an assent to the invasion of rights without compensation, and there is very high authority on this point to the effect that the Courts will be very slow to assume that the Legislature has, in the absence of express words, authorized the taking of the property of the subject without providing for compensation. I need not cite these authorities. They will be found collected in Maxwell, 7th ed., p. 245. It is sufficient to quote from Lord Bramwell in *Wells* v. *London, Tilbury, and Southend Ry. Co.* (1): "We may well approach the construction of an Act of Parliament of this kind in the belief that it was not intended to confiscate a private right, for this would be a simple case of confiscation, and we ought not to suppose that this was intended by the Legislature." In this connection it is interesting to observe that in the Electricity (Supply) Act, 1926, it is expressly provided that a Minister may make Orders with regard to the lopping and felling of trees, and that in such a case "he may determine any question as to what compensation (if any) is to be paid" (s. 3).

Of course, if the Attorney-General is right that unconditional assent does mean a consideration of a claim for compensation and its denial on merits, this canon will not apply; but I doubt very much, for the reasons I have stated, whether this is a proper construction. It follows that the authorities on this head thus afford yet another reason which militates against the view for which the Attorney-General contends.

I proceed to add two further reasons why I think the contentions of the Minister of Transport are ill-founded, reasons which are not strictly necessary to support the conclusion at which I have arrived, but which, owing to the gravity of the case, I have thought proper to add.

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(1) (1877) 5 Ch. D. 126, 130.

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The first is this: By s. 22, sub-s. 2, of the 1919 Act, the power of placing lines across land conferred by the section is expressed to include the power of placing a line across or along any railway. In the case of electric lines placed along the course of a railway, the proviso of sub-s. 1 does not apply, and, in its place, failing agreement between the electricity authority or undertakers and the railway company, the electricity authority or undertakers may apply to the Minister of Transport, who may decide against them that the line shall not be so placed; but if the Ministry of Transport do not make the decision, they are to refer the matter to the Railway and Canal Commission, who may make an Order for the placing of the electric lines, subject to such pecuniary terms as the Commission think just. Now it would appear that were it not for this paragraph ((*e*) (1.) of sub-s. 2), the electric lines so proposed to be placed along a railway might be damage to the railway caused in the execution of the works and so might fall within s. 17 of the 1882 Act, and the question of compensation would then be referred to the arbitrator under s. 28 of that Act (apart from the Acquisition of Land Act, 1919, which I subsequently discuss). But, here, it is provided, in terms, that the question of pecuniary compensation shall be be considered by the Railway and Canal Commission, and this is a case where, owing to the exclusion of the proviso, the Minister could not, in any event, impose terms whether pecuniary or otherwise.

Next, in the case of electric lines placed across but not along a railway (sub-s. 2 (*a*)), or across a canal (sub-s. 2 (*b*)), s. 15 of the Schedule to the Electric Lighting (Clauses) Act, 1899, applies, and s. 15 (*c*) of that Schedule provides that the owners may if they think fit serve a requisition upon the undertakers requiring that any question in relation to compensation shall be settled by arbitration. So that the result would appear to be that, either by arbitration in the case of a line across a railway, or by consideration before the Railway and Canal Commission in the case of a line along a railway, a judicial tribunal is required to consider the matter;

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which is consistent with the view that ss. 17 and 28 of the Act of 1882 still apply to cases other than railways, but that the only difference in the case of a railway is the nature of the arbitration court; on the Attorney's view, a railway company would have a right to a judicial arbitration which would be denied in the case of any owner or occupier whose right was invaded who did not happen to be a railway or canal. Such a construction may be necessary, but is perilously near an absurdity.

Yet another reason why I cannot accept the contention of the Minister is to be found in s. 39, sub-s. 2, of the Electricity (Supply) Act, 1919, whereby (inter alia) it is provided that the Minister of Transport shall refer to the Electricity Commissioners for their advice all matters connected with the exercise and performance of the powers and duties transferred to him under this section. The powers and duties transferred to him under this section are those mentioned in sub-s. 1 of the same section—namely, all the powers and duties of the Board of Trade under this Act or the Electric Lighting Acts: so that his power of imposing terms as a condition of assent or giving consent unconditionally under s. 2 of the same Act is a matter which he is required to refer to the Electricity Commissioners for advice.

Now the Electricity Commissioners are constituted under s. 1, sub-s. 1, of the 1919 Act for promoting, regulating, and supervising the supply of electricity, and if the Minister be right that he has the power to consider and determine upon compensation under s. 22, sub-s. 1, he must, before arriving at such a determination, consult a body of persons who are stated in s. 1 to be constituted for the purpose of promoting, regulating and supervising the supply of electricity. This also affords strong ground for doubting whether the Legislature ever intended to confer power on the Minister to impose terms other than those generally in connection with the promotion, regulation, and supervision of the supply of electricity, and it appears that Parliament certainly did not intend, and has not, in fact, legislated, to produce the result that the Minister can determine questions of compensation.

Finally, on this matter Mr. Tyldesley Jones indicated yet another curious result which would arise if the Minister of Transport were correct in his view. The authorities, which I do not quote, go to show that an adjacent owner to an owner whose rights are invaded may have a claim for compensation if his lands are injuriously affected or onerously burdened. The language of s. 17 of the Act of 1882 says that full compensation shall be given to all bodies and persons interested, and these words are certainly wide enough to include an adjacent owner. Now, in the case of an owner adjacent, the Attorney-General cannot argue that the consent of the Minister, even if it includes or excludes compensation for the owner affected, can possibly determine the compensation of the adjacent owner. But, as I understand, it is not denied that the adjacent owner may in such a case have a remedy under s. 17 of the 1882 Act, so that, on the Minister's view, the adjacent owner would be in a position to demand a judicial arbitration, whereas the owner himself, whose injury would in most cases be considerably greater, would be at the mercy of the Minister. Such a conclusion, if not calculated to produce another absurdity, is another ground for hesitating to conclude that the langugage of s. 22, sub-s. 1, has the meaning for which the Attorney-General contends.

There remains only the further decision of Macnaghten J., with which I agree, that in the case of the present plaintiffs, the Joint Electricity Authority, the Acquisition of Land Act, 1919, applies. It is conceded that the body is a public authority within the meaning of that Act. And once it is held that s. 17 of the Act of 1882 applies to this case, it appears to me clear that the defendants may say that, in the words of s. 1, sub-s. 1, of the Acquisition of Land Act, such land has been authorized to be acquired compulsorily by a public authority. The only argument against this view on such a construction was that the result would be that the Acquisition of Land Act would apply in the present case, but would not apply where there were undertakers who were seeking to acquire the rights in land and were a body of persons trading for profit. I agree that such a body would be excluded by

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s. 12, sub-s. 2, of the Acquisition of Land Act, but in such a case s. 28 of the Electric Lighting Act, 1882, would still apply, and the matter would be determined by a person nominated as arbitrator by the Minister. This does not seem to me to cause any difficulty; from 1882 to 1919 all matters relating to compensation would have been so referred. In the interest of local authorities the 1919 Act amended the 1882 Act, and provided other means of arbitration, which other means were not to be used in the case of persons trading for profit. In any event, this discrepancy of treatment is no reason for refusing to read the language of the legislation in its natural meaning, and I have come to the conclusion that Macnaghten J. was right in refusing to grant the declarations sought.

As to the cross-appeal, Mr. Tyldesley Jones has argued that he has retained a power, alternatively, to proceed under the Lands Clauses Acts for compensation. Now the Act of 1882 on which he is driven to rely for compensation at all, and, I think, properly relies, by s. 12, sub-s. 1, provides in terms that the Lands Clauses Acts shall be incorporated, "except the enactments with respect to the purchase and taking of lands otherwise than by agreement." And by s. 5 of the Lands Clauses Consolidation Act, 1845, it is provided that whereas it may be convenient in some cases to incorporate with Acts of Parliament hereafter to be passed some portion only of the provisions of this Act, it shall be sufficient in any such Act to enact accordingly, and thereupon the clauses so incorporated shall form part of the Act, but I see no reason to suppose that it was ever intended that by a kind of proleptic implication parts of the Lands Clauses Act which were not incorporated should be incorporated, and the clear fact emerges that the 1882 Act does not incorporate the 1845 Act in the case of land taken otherwise than by agreement.

For these reasons I think the appeal and the cross-appeal must fail.

Romer L.J. In exercise of the powers conferred upon them by s. 22, sub-s. 1, of the Electricity (Supply) Act, 1919, the West Midland Joint Electricity Authority have placed a number of pylons upon lands of the respondents, and by means of such pylons are maintaining on and over such lands a line of high voltage electric cables. It is not disputed that for this statutory appropriation of parts of their lands, and this statutory infringement of their rights of property, the respondents are entitled to receive compensation. The question to be decided upon this appeal is as to how, and by whom, the amount of that compensation is to be ascertained. The Minister of Transport, taking the view that by virtue of the proviso to the sub-section the compensation is to be fixed by him at such a sum as he may think just, has imposed upon the Authority as a term or condition of giving his consent to their carrying the pylons and lines of cable over the respondents' lands the obligation of paying the respondents certain rentals. The respondents, on the other hand, entertaining somewhat different views from those of the Minister as to what is just in the circumstances, and in any case objecting on principle to landowners being deprived of their property on the terms of receiving only such compensation, if any, as the Minister of Transport for the time being may happen to think just, contend (1.) that the compensation in such cases should be ascertained in accordance with the provisions of the Lands Clauses Consolidation Act, 1845, and of any other Acts amending or extending that Act; (2.) alternatively, that the compensation ought to be determined by arbitration under ss. 17 and 28 of the Electric Lighting Act, 1882, as amended, so far as the present case is concerned, by the Acquisition of Land (Assessment of Compensation) Act, 1919.

Macnaghten J. has decided against the contention of the Minister of Transport, and has made a declaration that the compensation ought to be determined by arbitration pursuant to the Electric Lighting Act, 1882, and the Acquisition of Land (Assessment of Compensation) Act, 1919. From that decision the Minister and the Joint Electricity Authority have appealed to this Court. The respondents have also served a cross notice of appeal asking that the declaration should be varied by adding a declaration giving effect to the first of their contentions that I have just mentioned.

Obviously the first question to be determined, and the one that goes to the root of the whole matter, is as to the meaning to be attributed in the proviso to s. 22, sub-s. 1, of the Electricity (Supply) Act, 1919, to the words: "subject to such terms, conditions, and stipulations as they think just." Do these words include terms, conditions, and stipulations as to the amount to be paid for compensation, or do they not? For the purpose of answering this question it is essential to bear in mind a principle relating to the construction of statutes that has often been laid down by the Courts, and has been stated by Lord Atkinson in the *Cannon Brewery* case (1) as follows: "An intention to take away the property of a subject without giving to him a legal right to compensation for the loss of it is not to be imputed to the Legislature unless that intention is expressed in unequivocal terms."

Now it is quite clear that the proviso in question contemplates the possibility of the Minister of Transport giving his consent to the placing an electric line across the land of a subject unconditionally, which means, of course, if the appellants are right, without the payment of any compensation at all. But an electric line cannot be so placed without taking away some of the rights of property of the owner or occupier of the land, and the exercise by the joint electricity authority or undertakers of the consequential power of entering on the land for the purpose of repairing or altering the line would be a further statutory invasion of such rights of property. If, therefore, the appellants are right, the section does show an intention, in some cases at any rate, to take away the property of a subject without giving him compensation. It was said by the Attorney-General that the Minister of Transport would, in practice, always provide for compensation as a term of giving his consent. Whether or not this can safely be predicated of every future Minister of Transport may, perhaps, be doubted. That the holders

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(1) [1919] A. C. 744, 752.

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from time to time of that office will always act in perfectly good faith can, of course, be taken for granted, but they may not always hold the same ideas of what is "just" where the owners of land are concerned. But, however that may be, the important consideration from the point of view of ascertaining the meaning of the Legislature is that it in terms gives the Minister power to consent unconditionally. In accordance with the principle to which I have referred, this alone is a reason for not giving to the words, "terms, conditions, and stipulations," the meaning for which the appellants contend. But even apart from the reason afforded by the power of giving an unconditional consent, an equally good one is, I think, afforded by the fact that the terms, conditions, and stipulations to be imposed are merely to be such as the Minister of Transport may think just. If the words enable the Minister to fix the compensation, the landowner will no doubt in many cases—it may be in all cases—get compensation of some kind. But he does not obtain a legal right to compensation as I understand those words. The compensation to which the statement of Lord Atkinson refers is surely compensation commensurate with the invasion of his property that the landowner has incurred, and not a compensation commensurate merely with the sense of justice possessed by the Minister of Transport for the time being. For these reasons I am, I conceive, precluded from treating the proviso as having the operation contended for by the appellants unless it shows in unequivocal language that such was the intention of the Legislature. Now it was urged by the Attorney-General that such an intention is expressed by the proviso in clear and unequivocal language. He pointed out that in other sections of this same Act the word "terms" or the words "terms and conditions" are clearly used as including pecuniary terms. This seems to be so: see ss. 6, 12, 15 and 19 (though it may be noticed that in s. 12, sub-s. 3, the phrase used is, "on such terms and conditions as to price and otherwise"). But there are an almost infinite variety of terms and conditions, and the question whether or not these words include in any particular case some particular kind of term or condition must depend upon the context in which they are used. Because in one section of the Act, and by virtue of the context, the words clearly include pecuniary terms, I am not compelled to hold that they include such terms in another section where the context seems strongly to point the other way. But he then said, and this seems to me a much more cogent argument, that the words "terms or conditions or stipulations" when first used in the proviso must include pecuniary terms, and that the same meaning should be given to the words when they occur some four or five lines lower down. The landowner, he said, would clearly be entitled to attach to his consent terms as to the payment of some particular amount of compensation, or as to the method of ascertaining compensation in some particular way. But I doubt whether this be so, or rather whether, if the landowner did so, he would be imposing a term or condition within the meaning of the proviso. If the proviso were not there an authority or undertaker exercising the powers given by sub-s. 1 would, as presently pointed out, have to pay compensation, either by virtue of s. 17 of the Electric Lighting Act, 1882, or, if the 1919 Act stood by itself, by virtue of the Lands Clauses Consolidation Act, 1845. In such a case, therefore, whenever the owner was asked to consent to the line being placed across his land, the payment of compensation, to be ascertained in the appropriate way, would be taken for granted. If his consent were given merely "subject to payment of proper compensation," he would not fail to give his consent. If, however, he consented, subject to payment of a certain sum for compensation, he would have failed to give his consent to that to which he was asked to consent. The result is the same when the proviso is added, if the words "terms, conditions, or stipulations" are treated as excluding terms as to the amount of compensation to be paid. In the first case supposed, his consent would be given. In the second case it would not, and the matter would go to the Minister of Transport, not because the landowner had attached any terms or conditions or stipulations within the meaning of the proviso, but simply because the landowner had failed to give his consent. The whole proviso, as it seems to me, is quite intelligible, and will work quite well without giving to the words "terms or conditions or stipulations" the meaning for which the appellants contend, a meaning that for the reasons already stated should not be given to them unless the language leaves no alternative. It might be that no alternative would be left, if the consequence of adopting the construction contended for by the respondents were that there was no provision for compensation at all. In that case the principle to which I have referred would necessitate the proviso being treated in the way the appellants desire. Better such compensation, if any, as the Minister of Transport may think just than no compensation at all. But it is, in my opinion, quite clear that compensation is amply provided for by s. 17 of the Act of 1882. It is enacted by s. 40, sub-s. 2, of the Electricity (Supply) Act, 1919, that the Act shall be construed as one with the Electric Lighting Acts. That being so, the power given by s. 22, sub-s. 1, of the Act of 1919 is one of the "powers in relation to the execution of works given them under this Act" within the meaning of s. 17 of the Act of 1882. Having had the advantage of reading Slesser L.J.'s judgment, I need not further enlarge either upon this point or upon the application to the present case of the Acquisition of Land (Assessment of Compensation) Act, 1919. It is sufficient to say that I agree with his conclusion, and the reasons that he gives for it. It only remains to consider the question arising upon the cross-appeal of the defendants.

If the Act of 1919 stood by itself, it seems clear that the Lands Clauses Consolidation Act, 1845, would be incorporated. Sect. 1 of that Act provides as follows: "This Act shall apply to every undertaking authorised by any Act which shall hereafter be passed, and which shall authorise the purchase or taking of lands for such undertaking, and this Act shall be incorporated with such Act; and all the clauses and provisions of this Act, save so far as they shall be expressly varied or excepted by any such Act, shall apply to the undertaking authorised thereby, so far as the same shall be applicable to such undertaking." Sect. 22, sub-s. 1, of the Act of 1919 clearly authorizes an undertaking, and also the taking of lands for the purposes of the undertaking, lands for the purpose of the Act of 1845 including an easement over land. The Act of 1845 is not expressly varied or excepted by the later Act. But the Act of 1919 is to be construed as one with the Electric Lighting Acts. Now s. 12 of the Electric Lighting Act of 1882 expressly incorporates the Lands Clauses Acts "except the enactments with respect to the purchase and taking of lands otherwise than by agreement." This exception was quite unnecessary, seeing that the Act of 1882 did not authorize the compulsory acquisition of land. Had the section, in pursuance of s. 5 of the Act of 1845, merely incorporated the provisions of that Act relating to the purchase of land by agreement, I do not think that the other clauses and provisions of that Act would have necessarily been excluded from the Electricity (Supply) Act, 1919, which did confer powers of compulsory acquisition of land. But unless the position is affected by some later Electric Lighting Act, there would in my opinion be an insuperable difficulty occasioned by the express exclusion from the Act of 1882 of those other clauses and provisions. The matter does not, however, end there. By s. 1 of the Electric Lighting Act, 1909 (which is another of the Electric Lighting Acts referred to in s. 40, sub-s. 2, of the Electricity Act of 1919), the Board of Trade were given power to authorize by Provisional Order the compulsory acquisition of land for the purpose of a generating station, and sub-s. 2 (so far as material) provides as follows: "For the purpose of the acquisition of land authorised to be taken compulsorily under any such Provisional Order, the provisions of the Lands Clauses Acts which relate to the purchase and taking of lands otherwise than by agreement . . . . are, subject to the modifications set out in the First Schedule to this Act, incorporated with the Electric Lighting Acts, as well as the provisions of those Acts already so incorporated by the Electric Lighting Act, 1882." Now it may be a question whether the words "For the purpose of" at the beginning of this sub-section limit the applicability of the incorporated Acts or merely indicate the reason why the Legislature made the incorporation. Some ground is afforded for the latter view by the opening words of the First Schedule, which are as follows: "The following modifications shall have effect in the construction of the provisions of the Lands Clauses Acts incorporated by this Act for the purposes of the Electric Lighting Acts." When, however, the body of the Schedule is looked at, one is, I think, driven to the conclusion that the applicability of the incorporated Acts is limited and is not of general application. For these reasons I think the clauses and provisions of the Act of 1845, relating to the acquisition of lands otherwise than by agreement, are not applicable to the taking of land under the powers of s. 22, sub-s. 1, of the Electricity (Supply) Act, 1919. The cross-appeal must therefore be dismissed.

The matter is not, however, of any great practical importance. The only advantage that the defendants would obtain from a decision on this point in their favour is that they could claim compensation for damage occasioned to their adjoining lands by the user of the electric cables on their lands, compensation that they could not claim under the provisions of s. 17 of the Act of 1882. But we were told by Mr. Tyldesley Jones that of the bodies and persons entitled to exercise the powers of s. 22, sub-s. 1, the only body exempted from liability for nuisance occasioned by their operations is the Central Electricity Board.

In the result I think that the decision of Macnaghten J. on both points was correct, and I agree that both the appeal and the cross-appeal should be dismissed with costs.

Appeal dismissed.

Solicitor for the Minister of Transport: *The Treasury Solicitor.*

Solicitors for the West Midlands Joint Electricity Authority: *Taylor, Rowley & Co., for Restall, Round & Gloster, Birmingham.*

Solicitors for the defendants: *Pettitt, Ramsay & Lampard, for Pitt & Cooksey, Bridgnorth.*

H. C. G.

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1932
March 21.

GOODMAN *v.* RUSTON AND HORNSBY, LIMITED.

Workmen's Compensation—Partial Incapacity—Inability to obtain Work mainly owing to Incapacity—Order treating Incapacity as Total—Award of Compensation from anterior Date—Condition that the Order "shall cease to be in force if the workman receives unemployment benefit"—Whether applicable to Retrospective Part of Award—Workmen's Compensation Act, 1923 (13 *&* 14 *Geo.* 5, *c.* 42), *s.* 16.

The Workmen's Compensation Act, 1923, s. 16, provides (1): "If a workman who has so far recovered from the injury as to be fit for employment of a certain kind proves to the satisfaction of the judge of the county court that he has taken all reasonable steps to obtain, and has failed to obtain, such employment, and that his failure to obtain such employment is a consequence, wholly or mainly, of the injury, the judge shall order that his incapacity shall, for the purposes of the principal Act, continue to be treated as total incapacity for such period, and subject to such conditions, as may be provided by the order . . . .

Provided that every such order shall be made subject to the condition that it shall cease to be in force if the workman receives unemployment benefit":—

Held, that the proviso does not apply to the part of an award made under this section giving compensation on the footing of total incapacity retrospectively from an anterior date but only to the award of compensation on the footing of total incapacity for the future.

Appeal from an award of the judge of the Lincoln and Horncastle County Court sitting as arbitrator under the Workmen's Compensation Acts.

The applicant, John Goodman, was employed by the respondents, Ruston & Hornsby, Ld., as a fitter until January 1, 1923, when he was employed as a marker off. On November 21, 1923, he met with an accident in the course of his employment owing to a crane wire breaking and a hook and block falling on to his right hand. The third finger had to be amputated and the whole hand was injured, with the result that there was great loss of power and grip. He received compensation at the full rate of 1*l.* 15*s.* a week until February 25, 1924, when he resumed his work as a marker off. On August 21, 1924, an agreement containing a declaration of liability was filed. On July 19, 1930, he was promoted to be an inspector and held this post till October 10, 1931, when he was discharged owing to shortage of work.

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(1) This section was re-enacted as s. 9, sub-s. 4, of the Workmen's Compensation Act, 1925, and enacted in an amended form but with the same proviso in the Workmen's Compensation Act, 1931.

On January 15, 1932, the applicant commenced these proceedings, claiming compensation at the full rate of 1*l.* 15*s.* a week to begin from October 10, 1931, on the ground that, though in fact only partially incapacitated, he had been unable to obtain work mainly owing to his incapacity.

During part of the time between October 10, 1931, and the hearing on February 15, 1932, the workman had received unemployment benefit.

The workman gave evidence at the hearing before the county court judge that he had tried to get employment, but failed. He went to Robey's in January, 1932, and asked for work as a marker or inspector. He was offered work as a fitter, but was compelled to refer to his injured hand, and he was then refused work on account of it. He could not have done the heavy work at Robey's. He could not do all inspection work. He could use light tools, but could not do the adjusting work. If his hand was all right he could do work as a fitter but, as it was, he could not.

Arthur Scott, foreman in Robey's fitting and erecting shop, said the workman had applied for work in January, 1932: "I did not see his hand at first. I said I would give him a job as light fitter on trial. Then on questioning him (according to form) I asked if he was injured. He said 'Yes.' I said, I cannot give you a start. If his hand was good I would have given him a start."

Mr. Percy Williams, works' manager to the employers, said in cross-examination that other employers would do as Scott did. Loss of two fingers did not affect him as inspector or marker off. As fitter he would choose a five-fingered man in preference to a man with three fingers only.

The county court judge said that the workman claimed to be partially incapacitated and that such partial incapacity should be treated as total under s. 16 of the Workmen's Compensation Act, 1923. The respondents contended that

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he was able to do the work of inspector and that there was therefore no loss of earning capacity. The workman admitted that he could do the work of an inspector, but that was only a branch of the fitter's work and not a separate grade of labour. He found that the applicant's trade was that of a fitter, and that inspectors and markers off were fitters doing special work and were only appointed from the fitters in particular works.

The applicant's condition as the result of the accident had definitely reduced his chance of getting work owing to physical incapacity which had diminished his earning powers considerably. He was, therefore, entitled to be regarded as partially incapacitated. The workman had taken all reasonable steps to obtain employment and had failed to do so, mainly in consequence of his incapacity. The incapacity must, therefore, be treated as total.

Sect. 16 provided that any order made under that section should be subjected to the condition that it should cease to be in force if the workman received unemployment benefit. His order was of this date, although it had a retrospective effect, and he considered that the Act only required him to attach such a condition for the future and not to apply it to the past. The order would be for payment of 31*l.* 10*s.*, being the amount of weekly payments at 1*l.* 15*s.* a week from October 10, 1931, to February 13, 1932, and that the employers should henceforth pay 1*l.* 15*s.* a week compensation.

The employers appealed. The appeal was heard on March 21, 1932. At the hearing it was admitted on behalf of the appellants that there was evidence on which the county court judge could hold that s. 16 of the Act of 1923 applied, and the only question argued was whether the county court judge ought not to have made the condition as to receipt of unemployment benefit apply to the retrospective part of his order. The award as drawn up omitted to insert the proviso for the future, but this was admittedly a mistake.

Derbyshire K.C. and *Alun Pugh* for the appellants. By the proviso to s. 16 of the Workmen's Compensation Act, 1923 (a section which was re-enacted as s. 9, sub-s. 4, of the Act of 1925, and enacted in an amended form in the Workmen's Compensation Act, 1931), every order for the treatment of partial incapacity as total incapacity is to be made "subject to the condition that it shall cease to be in force if the workman receives unemployment benefit." The county court judge held that the proviso applied only to the future part of his order, and not to the retrospective part of the order. It is submitted that there is no justification for this distinction. The workman here received unemployment benefit for a time before the date of the award, and it is not right that he should receive compensation also for that period.

Elwes for the respondent. The intention of the proviso is that as from the time when the workman is entitled to compensation under an award, he may select between taking compensation under the award or taking unemployment benefit. He may not have both. If the proviso was treated as relating back it would work unfairly, for at the time when he received unemployment benefit he had not the other resource open to him. Further, the words of the proviso are future. It would have been simple to attach the condition to the past by clear words if that had been the intention.

[GREER L.J. Even if the proviso only applies for the future, the county court judge would still have a discretion to attach some such condition retrospectively under the words in the body of the section.]

That is so, but the compulsory condition provided for is intended only to relate to the future. That is made additionally clear by the form of the proviso under which the order is to "cease to be in force" if the workman receives unemployment benefit. That must necessarily be intended to apply for the future only.

Derbyshire K.C. in reply. Sect. 41 of the Workmen's Compensation Act, 1925, provides for repayment of outdoor relief granted to a person pending the settlement of his claim for compensation. The proviso to s. 16 of the Act of 1923 (or s. 9, sub-s. 4, of the Act of 1925) is intended in the like manner to secure that a workman shall not for any period receive both compensation at the full rate and unemployment benefit. For the retrospective period it is contended that the county court judge should either have suspended the payment of compensation during the period when the man was receiving unemployment benefit or have awarded compensation on the footing of partial incapacity only during that period. In *King* v. *British Steel Corporation, Ld.* (1), compensation was made to commence only from the date when the workman ceased to receive unemployment benefit. The case should be sent back to the judge to give compensation on the footing of partial incapacity only during the time when the workman was receiving unemployment benefit.

LORD HANWORTH M.R. This appeal, which raises an interesting point, fails. The notice of appeal raised a great many more points which, after consideration, Mr. Derbyshire decided could not prevail in this Court, and in that judgment of his he was clearly right. [His Lordship then stated the facts :] The county court judge came to the conclusion that he could exercise the powers which are given to him by s. 16 of the Workmen's Compensation Act, 1923, which is the Act that applied to this accident. It is an accident which took place and for which compensation had to be paid under the Workmen's Compensation Act, 1906, as amended by the Act of 1923. The county court judge, upon the materials before him, held that there was power to order the workman's partial incapacity to be treated as total incapacity and he did so, holding upon the evidence which I have referred to that his failure to obtain employment was mainly in consequence of the injury he had received. The result was that he made an order, on the basis of total incapacity, that he should be paid 35*s*. a week. So far, the matter is plain, and I recognize the validity of Mr. Derbyshire's judgment in saying that upon those matters it was impossible to upset the county court judge's award, based, as it was, upon evidence which justified his conclusion in law.

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(1) (1928) 21 B. W. C. C. 37.

But another point arises. Before January, I think, but certainly in January, the workman had received unemployment benefit, and it is said that thereupon the proviso to s. 16 of the Act of 1923 became applicable. That proviso is the same as the proviso to s. 9, sub-s. 4, of the Act of 1925. I only mention this to show that the proviso to s. 16 of the Act of 1923 has been maintained in the Act of 1925. The terms of that proviso are: "Provided that every such order shall be made subject to the condition that it shall cease to be in force if the workman receives unemployment benefit." The learned county court judge, when dealing with that, said: "My order is only made on this date"—that is to say, on February 15—"although it has retrospective effect." That is because he ordered the 35*s.* a week to be paid as from October 10, 1931, the date when the workman was discharged. He added: "I consider the Act only enables me to attach such a condition for the future and not to apply it to the past. I attach that condition, as directed in the Act, but I refuse to make any condition having retrospective effect." From that the employers appeal, and contend that the county court judge ought to have freed them from liability to pay the 35*s.* a week during such time as the man in fact received unemployment benefit.

Turning to the proviso, I find it impossible to construe it as meaning that if and when the workman receives unemployment benefit all further effect of the order to pay compensation shall cease. The proviso cannot mean that the order for payment is only to continue, unless and until the man happens to receive one week of unemployment benefit, and that upon such receipt he is to lose the whole of the benefit of the order. I think it must mean that when in the future he receives unemployment benefit, that is to be taken into account pro tanto; but, however that may be, it does appear that the proviso is dealing with the future only. It begins "provided that every such order." What order is that? It is an order, which upon certain facts being proved the judge shall make, that the incapacity "shall, for the purposes of the principal Act, continue to be treated as total incapacity for such period, and subject to such conditions, as may be provided by the order." All those words indicate that the order to be made is one dealing with the future. In those circumstances, the proviso seems inapt to have a retrospective effect and must be read and treated, as the county court judge has treated it, as dealing with the future only; and if and so far as the award has failed to carry out what was the county court judge's obvious intention, it must be rectified.

It is said that even though the order referred to in the proviso is one made as to the future, the learned county court judge is given power in the main part of the section to make his order subject to such other conditions as he may think fit. And Greer L.J. has pointed out that it is open to the county court judge, under those words, to impose a condition that the order shall not be effective, and the money, therefore, shall not be paid, unless and until the recipient undertakes to repay any sum which he has received by way of unemployment benefit. It would certainly seem that the intention of the Act is to prevent a man receiving from his employers a weekly payment based on total incapacity while he is, at the same time, receiving unemployment benefit. The reason why the man is entitled to receive a weekly payment on the basis of total incapacity is that he has not been able to obtain work, and if he receives unemployment benefit at the same time, he is making use of the fact that he is out of work twice over, first to obtain compensation for total incapacity, and next to obtain unemployment benefit. In order to remedy that, as Greer L.J. has pointed out, it might be that a condition should be imposed which would prevent that happening and compel a repayment of the sum received by way of unemployment benefit during the time for which the order provides that a back payment should be made to the workman on the basis of total incapacity.

Sect. 41 of the Act may be usefully looked at for this purpose, for a scheme is there provided under which there may be repayment of poor relief, or of such relief as was in excess of what would have been granted had the workman been in receipt of the weekly payment of compensation under that Act.

In the present case the learned county court judge has declined to attach any condition having a retrospective effect. The result is that the order he has made, subject to the correction of the slip in it to which I have referred, is correct. I have ventured, however, to point out the possibility of making use of those words "subject to such conditions" in order that, in a proper case, a judge may satisfy the employers in regard to their natural reluctance to pay the full sum for total incapacity under the Workmen's Compensation Act to a workman who at the same time is benefiting from their contributions to unemployment benefit. For these reasons the appeal must be dismissed with costs.

GREER L.J. I agree that this appeal should be dismissed with costs. It raises an interesting question as to the meaning of s. 16 of the Workmen's Compensation Act, 1923, and the application of that section to the facts proved in the present case. The section seems to me to provide for two sets of conditions which must or may have to be imposed upon the workman when the learned judge decides to treat his partial incapacity as total incapacity. Some of the conditions are within the discretion of the learned county court judge; the condition with which this appeal is concerned is not within the discretion of the judge, but is necessarily to be imposed by reason of the proviso. The proviso says that "every such order shall be made subject to the condition that it shall cease to be in force if the workman receives unemployment benefit."

Difficulties may arise in future cases as to the meaning of the words "cease to be in force"; but they do not arise in this case, and I prefer not to express any opinion whether they are equivalent to "shall be suspended for the time being" or "shall altogether cease." That question may have to be determined in some future case, but the question arising in the present appeal is whether or not the order mentioned in the proviso is an order relating to the future

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only, or an order relating also to the past. I cannot read the proviso as applying to anything but an order for the future. The words seem to me inconsistent with the notion that it was intended to impose a condition applicable to the time before the order was made. I think the proviso means that the order is to be made subject to the condition that it shall cease to be in force if the workman at any time after the date of the order receives unemployment benefit. It may be true to say that those who drafted this section had not in their minds the kind of facts proved in the present case. But the question whether a workman who has, up to the date of an award, been in receipt of full unemployment benefit should be entitled to have compensation for the whole period during which he received the unemployment benefit can be dealt with by the learned judge under the power which he has in the earlier part of the section to impose conditions. I do not see why he should not impose a condition that before any money is received in respect of that period repayment should be made to the unemployment insurance authorities. On the other hand, I see no reason why he should not make it a condition that, in regard to the period which preceded the date of the award, credit should be given by the workman for the amount received in unemployment benefit. But the question which of those two conditions, or whether any condition, should be imposed is a question entirely for the county court judge, and no point arises upon it in the present case. The only point that we have to consider is whether the proviso to s. 16 is one intended to apply with regard to the future only or also with regard to the past. The suggestion was made in argument that the learned judge might treat the man as being only partially incapacitated during the period when he was receiving unemployment benefit. That does not seem to me to fit in with the object of the section. The workman received unemployment benefit for exactly the same reason that the learned judge was willing, in this case, to give him appropriate compensation —namely, that he could not get employment; but the learned judge had to consider a matter which did not concern unemployment insurance authority—namely, whether his inability to get employment was due to the accident or not. I do not think it would be right for the learned judge to treat the workman as only partially incapacitated during the period when unemployment benefit was received, and totally incapacitated after that period. The difficulty might be met, in the way I have already suggested, by imposing a condition under the first part of s. 16.

ROMER L.J. I agree. There is, as it seems to me, a very short answer to the argument of Mr. Derbyshire. Had the proviso said that as from the date when the workman received unemployment benefit the payment provided by the order should cease to be made, there would be no difficulty in the matter, because just as orders may, and nearly always do in these workmen's compensation cases, provide for payment to be made as from a past date, so the order can quite easily direct that the payment shall cease to be made as from a date antecedent to the date of the order. But the proviso says that on the happening of a certain event the order shall cease to be in force. Now the order does not begin to be in force until it is made, and therefore the event on which the order is to cease to be in force must necessarily be an event happening after the date of the order. For these reasons I agree that the appeal should be dismissed with costs, and the order must be varied in the way directed by the Master of the Rolls.

Appeal dismissed.

Solicitors: *Waterhouse & Co., for Andrew, Race, Midgley & Hill, Lincoln; Church, Adams, Tatham & Co., for J. B. Anderson & Co., Lincoln.*

H. C. G.

C. A.
1932
Jan. 22.

In re MORGAN AND ANOTHER AND PROVINCIAL INSURANCE COMPANY, LIMITED.

Insurance—Accident—Motor Lorry—Proposal Form—Statements made Basis of Contract—Warranty—Condition—Description of Risk.

Coal merchants, owners of a motor lorry, applied to an insurance company and signed a form of proposal for an insurance against damage to the lorry and against liability for injury to persons and damage to other vehicles caused by the use of the lorry. The proposal form contained questions to be answered by the proposers as to the purpose for which the lorry was to be used and the nature of the goods to be carried. The proposers answered that the purpose was the delivery of coal and that the substance to be carried was coal. The company issued a policy which, after reciting that the assured had made the proposal and signed a declaration which it was agreed should be deemed to be of a promissory nature and effect and should be the basis of the contract for the insurance as if it had been incorporated in the policy, went on to witness that it was a condition precedent to any liability on the part of the company that the statements made and the answers given in the proposal form should be true, correct and complete. The premium paid by the assured was less than that which would have been payable if they had stated that the lorry was to be used for the purpose of general haulage. On a day during the period covered by the policy the assured were using the lorry for carrying a load of timber together with 5 cwt. of coal. After they had delivered all the timber and 3 cwt. of coal, and while they were on their way to deliver the remaining 2 cwt. of coal to a customer, a collision occurred between the lorry and a motor car.

In an action by the assured upon the policy:—

Held, that the questions in the proposal form were for the purpose of defining the risk, so that the plaintiffs should be covered while the lorry was carrying coal but not covered while it was carrying goods other than coal; that the answers were not intended to import conditions precedent to the liability of the defendants in the sense that if the lorry carried a load of timber the policy should be avoided; and that, as at the time of the collision the lorry was carrying coal and nothing else, the plaintiffs were entitled to recover.

Farr v. *Motor Traders Mutual Insurance Society* [1920] 3 K. B. 669, and *Roberts* v. *Anglo-Saxon Insurance Association* (1927) 96 L. J. (K. B.) 590 followed. *Dawsons, Ld.* v. *Bonnin* [1922] 2 A. C. 413 distinguished.

APPEAL from the decision of Rowlatt J. upon an award in the form of a special case stated by an arbitrator under s. 7 (*b*) of the Arbitration Act, 1889.

Messrs. Morgan & Foxon (hereinafter called "the claimants") were coal merchants carrying on business at

Abercarn in the county of Monmouth. They had effected a policy of insurance with the Provincial Insurance Company, Ld. (hereinafter called "the Company"), in respect of a 15.9 horse power Morris commercial truck. The policy was numbered 1,106,555. It was dated April 8, 1930, and was made in compliance with a proposal dated March 26, 1930, and it recited that the claimants had made the proposal and signed a declaration which it was agreed should be deemed to be of a promissory nature and effect and should be the basis of the contract for the insurance intended to be made in all respects as if it had been incorporated in the policy. The policy was subject to conditions, one of which was that any difference or dispute arising between the Company and the claimants upon the terms of the policy should be referred to arbitration under the Arbitration Act, 1889, and that the obtaining of an award in such an arbitration should be a condition precedent to any liability on the part of the Company.

A dispute having arisen, the claimants and the Company submitted the matter to the arbitration of Mr. Stanley Evans, Barrister-at-Law, by an agreement in writing dated February 17, 1931, which recited that on August 25, 1930, a collision had occurred between the claimants' 15.9 horse power Morris commercial truck, the subject of the policy, and a motor car belonging to one Charles John Thomas.

On March 9, 1931, the claimants delivered points of claim alleging that through the collision damage had been caused to the claimants' vehicle and bodily injury to the said C. J. Thomas and to one Rose Winter and damage to the motor car; that on November 21, 1930, proceedings were taken in the Blackwood Police Court against the claimants for negligent driving at the time of the collision; and that the Company wrongfully denied their liability to indemnify the claimants either in respect of damage to their vehicle or of claims by C. J. Thomas and Rose Winter in respect of bodily injury, or in respect of claims by C. J. Thomas for damage to his car; and wrongfully refused to defend the proceedings in the Police Court on behalf of the claimants and to meet the costs of those proceedings. They claimed :—

1. A declaration that the Company were liable to indemnify them against the damage caused to their motor lorry and also against all sums for which they might be held legally liable (including law costs incurred in the investigation, defence, or settlement of any claim) to the said Charles John Thomas and Rose Winter for damages for personal injuries or to the said Charles John Thomas for damage to the said motor car in consequence of the said collision.

2. A declaration that the Company were liable to pay to the claimants the costs of the proceedings in the Police Court.

3. Payment of the claimants' costs of repairs of their motor lorry and of all sums for which the claimants might be held legally liable to the said C. J. Thomas and Rose Winter and of all law costs incurred by the claimants in the investigation, defence, or settlement of any claims made by them and of all costs incurred in the claimants' defence in the said proceedings in the Police Court.

On March 11, 1931, the Company delivered points of defence. They denied that they were liable to undertake the defence of the proceedings in the Police Court inasmuch as the terms of the policy of insurance had not been complied with, in particular that the insured vehicle was not being used by the claimants for the purposes of their business as provided by the policy.

On July 10, 1931, the arbitrator published his award, in the form of the following special case :—

1. On March 26, 1930, the claimants signed a proposal form for the insurance by the Company under certain conditions of their motor lorry, described as a 15.9 horse power Morris commercial truck.

2. The following is an extract of information asked for by the Company and the answers given by the claimants on the proposal form :—

"State (*a*) the purposes in full for which the vehicles will be used ; and (*b*) the nature of the goods to be carried." Answers : "(*a*) Delivery of coal ; (*b*) Coal."

3. The Company accepted the proposal, and on April 8, 1930, duly issued a policy of insurance to the claimants numbered 1,106,555 in respect of the motor lorry.

4. The policy was to remain in force until April 4, 1931.

5. By the policy the Company agreed for the consideration stated but subject to the terms, exceptions, and conditions contained therein or indorsed thereon to indemnify the claimants during the subsistence of the policy against :—

(i.) Liability to the public—(*a*) Liability at law for compensation (including the law costs of any claimant) for death of or bodily injury to persons not in the service of the insured caused by the use of any vehicle described in the schedule hereto ; (*b*) Liability at law for damage (including law costs of any claimant) to property (including animals) other than the property of the insured or in his custody or control, caused by the use of the vehicle ; (*c*) Liability at law as defined in clauses (*a*) and (*b*) above for death, injury or damage arising out of and during the operation of loading or unloading the vehicle, which shall not include the collection or delivery of the load beyond the limits of any carriage way or thoroughfare ; (*d*) Law costs incurred with the written consent of the Company in the defence of the insured against any claim in respect of such death, injury or damage.

(ii.) Loss or damage—The loss of or damage to the vehicle and necessary lamps, tyres, and accessories whilst thereon caused by—(*a*) accidental external means ; (*b*) fire, self ignition, lighting or explosion ; (*c*) theft or any attempt thereat, or (*d*) malicious act : Provided always that the Company shall not be liable for damage to tyres unless the vehicle is damaged at the same time and the Company is liable to pay for that damage under this policy. In the event of accident causing damage to the vehicle and providing that the damage is covered hereunder the Company will pay the reasonable cost of protection and removal of the vehicle to the nearest repairers.

6. The policy contained the following condition :—

" (6.) It is a condition precedent to any liability on the part of the Company under this policy (i) that the terms, provisions, conditions, and indorsements hereof, so far as they relate to anything to be done or complied with by the insured, are duly and faithfully observed; and (ii) that the statements made and the answers given in the proposal hereinbefore referred to are true, correct and complete."

7. On August 25, 1930, a collision occurred between the motor lorry and a motor car belonging to a third party whereby damage was done to the motor lorry and to the motor car, and certain persons sustained injuries as a result of the collision.

8. The Company disputed their liability in respect of the damage to the vehicles and in respect of the injuries sustained by the persons and all other liability under the policy.

9. At the hearing of the reference the Company contended that they were not liable in respect of the matters aforesaid by reason of condition (6.) of the policy and the extract hereinbefore set out of the proposal. The Company contended that it was a condition precedent to any liability that the motor lorry should be used solely for the delivery of coal and not otherwise. They contended that the answers to Question 1 of the proposal (set out in para. 1 hereof) constituted a warranty.

10. Alternatively they contended that they would not be liable in respect of para. 7 hereof if at the time of the collision the motor lorry was being used for any purpose other than for the delivery of coal.

11. It was agreed between the claimants and the Company that if the Company were liable they were liable as contended for by the claimants in their points of claim.

12. The arbitrator found as facts :—

(*a*) At a date subsequent to the issue of the policy the claimants had entered into a verbal contract with the Forestry Commissioners for the hauling of timber in the motor lorry.

(*b*) The hauling of timber was carried out at such times as might be arranged between the claimants and the Forestry Commissioners.

(*c*) The said contract did not prevent the claimants from using the lorry for delivering coal.

(*d*) On August 25, 1930, the lorry had been used until noon solely for delivering coal.

(*e*) In pursuance of an arrangement with a representative of the Forestry Commissioners the claimants had agreed to haul two loads of timber on the afternoon of that day.

(*f*) At 3.45 P.M. the claimants in fact hauled a load of timber in the lorry.

(*g*) At 6.30 P.M. the claimants hauled a second load of timber, but also had on the lorry 5 cwt. of coal, which they were intending to deliver when they had completed the journey with the second load of timber.

(*h*) At the request of the representative of the Forestry Commissioners the claimants hauled a third load of timber, and the 5 cwt. of coal remained on the lorry for delivery when they had finished hauling the third load.

(*i*) After delivering the third load of timber the claimants proceeded to deliver the coal.

(*j*) The claimants had in fact delivered 1 cwt. of coal to one customer and 2 cwt. of coal to another customer before the collision occurred, and were on their way to deliver the remainder to a customer when the collision occurred.

(*k*) The claimants were engaged in the business of delivering coal when the collision occurred.

(*l*) The premium payable by the claimants under the policy was less than it would have been if on the proposal they had stated that the purpose for which the lorry was to be used was general haulage.

13. The arbitrator held (subject to the opinion of the Court upon the question of law hereinafter submitted) that the claimants were entitled to :—

(i.) A declaration that the Company were liable to indemnify the claimants against damage caused to the claimants' motor vehicle (registered number W. O. 4061) on August 25, 1930, in the said collision, and also against all sums for which the claimants might be held legally liable (including law costs incurred in the investigation, defence or settlement of any claim) to one Charles John Thomas and one Rose Winter for damage for personal injuries sustained in the collision or to the said Charles John Thomas for damage to his motor car in consequence of the collision.

(ii.) A declaration that the Company are liable to pay to the claimants the costs of defence in the proceedings in Blackwood Police Court on the hearing of a summons against the claimants on November 21, 1930, in connection with the collision.

14. The arbitrator directed (subject to the opinion of the Court as aforesaid) that the Company should pay to the claimants the costs of the arbitration, and further directed that if the claimants should in the first instance pay the costs of the award or any part thereof, the Company should repay the same to the claimants.

15. At the same hearing the Company by their solicitor contended: (*a*) that, inasmuch as the claimants had used the motor lorry at a time during the subsistence of the policy for hauling timber, they, the Company, were not liable thereafter under the policy; (*b*) that the claimants were not engaged in the delivery of coal when the collision occurred. The arbitrator found that (*b*) was not correct.

16. The arbitrator did not accept or give effect to the contention of the Company in para. 15 (*a*).

17. The question for the Court was whether in respect to this decision the arbitrator had come to a right determination.

18. If the Court should be of opinion that the arbitrator was right and that the liability of the Company did not end when the claimants used the motor lorry for hauling timber, then the award was to stand; but if the Court should be of opinion that in the circumstances the Company were not liable as aforesaid to the claimants, then the arbitrator directed that the claimants should pay the costs of the arbitration, and he further directed that if the Company should in the first instance pay the costs of the award or any part thereof, the claimants should repay the same to the Company.

Rowlatt J. held that the award in favour of the claimants was correct.

The Company appealed.

Wallington for the appellants. The arbitrator has found that the premium payable on an insurance of a lorry was less if the lorry was to be used for carrying coal than it would be if the lorry was to be used for general haulage. Accordingly the question, " State the purposes in full for which the vehicle will be used ? " and " State the nature of the goods to be carried ? " were very material in the matter of fixing the premium. They were not merely descriptive of the risk, as this Court construed the statement in *Farr* v. *Motor Traders Mutual Insurance Society* (1) to be—the statement that the taxi-cab was to be driven in one shift only per twenty-four hours. There was no evidence in that case that the premium was higher if the cab was driven in more than one shift in the time. The effect of the statement was held to be that the cab was covered by the insurance only while it was being driven in one shift in twenty-four hours, but that it ceased to be covered if and so long as it was being driven in more than one shift in that time. The fact that it had been driven on occasion in two shifts in the twenty-four hours did not avoid the policy ; it was an immaterial fact so far as the validity of the policy was concerned ; it went to the scope and extent of the insurance, not to its validity. The present case, where the truth of the statement affects the amount of the premium, is very different. It falls naturally into the class represented by *Dawsons, Ld.* v. *Bonnin* (2), where the parties have, for reasons of the cogency of which they are the best judges, agreed that it shall be a condition precedent to any liability under the policy that the answers given shall be correct and complete.

W. Matabele Davies for the respondents. In *Dawsons, Ld.* v. *Bonnin* (2) it was not necessary to decide whether the answer to the question in the proposal form was a condition of the policy or was merely descriptive of the risk covered.

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(1) [1920] 3 K. B. 669.

(2) [1922] 2 A. C. 413.

If it was to be taken as merely descriptive it plainly described a risk which was not the risk in respect of which the assured claimed. The motor car covered by the policy was one garaged in Glasgow; the car which was destroyed was the same car no doubt, but the risk was not the same because the car was never garaged in Glasgow but in a farm outside. In *Roberts* v. *Anglo-Saxon Insurance Association* (1) the purpose for which the vehicle, the subject of the insurance, was to be used was stated to be commercial, and the nature of the goods to be carried was declared to be textile; and the assured warranted the statement to be true and agreed that it should be promissory and should form the basis of the contract between him and the insurance company, and the policy contained the words "warranted used only for commercial travelling." The vehicle was destroyed by fire while carrying passengers. It was held that the assured could not recover, but the judgment was based expressly upon the ground that the words in the policy were descriptive of the risk. That case was decided several years after *Dawsons, Ld.* v. *Bonnin* (2) in the House of Lords.

Wallington in reply. *Dawsons, Ld.* v. *Bonnin* (2) was not cited to the Court in *Roberts* v. *Anglo-Saxon Insurance Association.* (1) In *Dawsons'* case (2) the House of Lords laid down general rules for the construction of policies in the same form as that in the present case. The decision of their Lordships is inconsistent with the judgment of this Court in *Farr* v. *Motor Traders Mutual Insurance Society* (3), which must therefore be taken to be overruled and can afford no support to *Roberts* v. *Anglo-Saxon Insurance Association* (1), which must fall with it.

SCRUTTON L.J. In this case the owners of a motor lorry had insured themselves with the appellants against liability for injury or damage caused by the use of the lorry or to the lorry itself. They allege that a loss has happened within the meaning of the policy. They had signed a form of proposal for a commercial motor insurance which required them to state: "(*a*) the purposes (in full) for which the vehicles will be used; and (*b*) the nature of the goods to be carried." They had answered that the purpose was the "delivery of coal" and that the nature of the goods to be carried was "coal." A collision occurred while the lorry was in fact carrying coal and nothing else. But the appellants answer that at a previous time the lorry had been carrying timber; that there was a warranty or promise that nothing but coal should be carried, and when timber was carried that promise was broken and the whole policy invalidated; and, although the carriage of the timber in no way led to the collision, they are exempt from liability. Rowlatt J. has decided against this contention, following *Farr* v. *Motor Traders Mutual Insurance Society* (1), a previous decision of his own affirmed by this Court. The insurance company appeal.

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(1) 96 L. J. (K. B.) 590.
(2) [1922] 2 A. C. 413.
(3) [1920] 3 K. B. 669.

In many cases of this class the question has arisen whether answers in a proposal form are promises that a certain state of things shall continue, or a certain course of conduct shall be pursued, during the whole period covered by the policy, so that if the particular promise is not kept the policy is invalidated; or whether these promises are merely descriptive of the risk, so that if the accident happens while the promised state of things subsists there is a valid claim, but if the accident happens while the state of things has ceased or been interrupted there is no valid claim; but that, provided the loss occurs while the state of things is in being the policy is not avoided by the fact that at some other time the state of things has been discontinued or interrupted. Rowlatt J. has held that the questions and answers in the proposal form were descriptive of the risk, and that, as the lorry was carrying coal when the accident happened, the appellants are liable.

No doubt a great deal turns upon the language of the particular policy; but it must be remembered that in contracts of insurance the word "warranty" does not necessarily mean a condition or promise the breach of which will avoid the policy. A warranty that a marine policy is free from particular average certainly does not mean that if there is a partial loss to the insured ship the whole policy is avoided. It merely describes the risk, and means that the only risk being insured against is the risk of a total loss and that a partial loss is not the subject of the insurance. Again, if a time policy contains the clause "warranted no St. Lawrence between October 1 and April 1," and the vessel was in the St. Lawrence on October 2, but emerged without loss, and during the currency of the policy in July a loss happens, the underwriters cannot avoid payment on the ground that between October 1 and April 1 the vessel was in the St. Lawrence: *Birrell* v. *Dryer.* (1) That is an example of a so-called warranty which merely defines the risk insured against.

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(1) [1920] 3 K. B. 669.

The present case turns largely on the true view of the authorities. In *Farr* v. *Motor Traders Mutual Insurance Society* (2), a decision of this Court, the assured had two motor taxis. In the negotiation for insurance in respect of them he was asked and answered questions as follows: "State whether the vehicles are used for public or private hire?" He answered, "Public." He was asked, "Is the vehicle driven solely by the proposer?" He answered, "No." "If not, state whether driven in one or more shifts per twenty-four hours?" The answer was, "Just one." Soon after the risk attached one of the taxi-cabs was disabled and the other was driven for two shifts of twenty-four hours for a short period. No accident happened. Some considerable time afterwards, when the taxi-cab was being habitually driven in one shift in twenty-four hours, an accident happened. The assured claimed. The Court held that the answers in the proposal form were descriptive of the risk and were not conditions restricting the conduct of the assured during the whole period of the policy, any breach of which would preclude the assured from recovering. That case was decided in 1920. In 1927 the very similar case of *Roberts* v. *Anglo-Saxon*

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(1) (1884) 9 App. Cas. 345.

(2) [1920] 3 K. B. 669.

Insurance Association (1) came before the Court. There the assured had been asked: "State clearly the purposes for which the vehicles are to be used?" Answer: "Commercial." "State nature of goods to be carried." Answer: "Textile Goods." The accident happened when the vehicle was in fact carrying passengers and not goods. The arbitrator had decided in favour of the assured. The Divisional Court, Salter and MacKinnon JJ., affirmed that decision on other grounds. The Court of Appeal reversed these decisions after definitely approving the principle of *Farr's* case. (2) They held that the answers, "Commercial" and "Textile Goods," were descriptive of the risk and not conditions of the validity of the policy; and that the question in the case was whether the accident which happened was within the class described. They held that a vehicle carrying passengers was not being used for the commercial purpose of carrying goods; that the risk in respect of which the claim was made was not the risk insured against, and consequently that the claim under the policy must fail. All three members of the Court re-stated the distinction between warranties and descriptions of risk and decided the case upon that footing.

During the argument in *Roberts* v. *Anglo-Saxon Insurance Association* (1) the decision of the House of Lords in *Dawsons, Ld.* v. *Bonnin* (3) was not cited. Mr. Wallington contends that the two decisions of the Court of Appeal are to be taken as overruled by that case. In my view that case materially differs in its facts from the two cases in this Court. The questions to be answered in the proposal form were: "Proposer's name?" Answer, "Dawsons, Ld." "Proposer's address?" Answer, "No. 46 Cadogan Street, Glasgow." "For what purpose will the vehicle or vehicles be used?" Answer, "Business purposes." "State full address at which the vehicles will usually be garaged?" Answer, "Above address"—that is, No. 46 Cadogan Street, Glasgow. In fact the vehicle was not usually garaged, either when the answer was made or during the currency of the policy, at No. 46 Cadogan Street, Glasgow, but at a farm in the outskirts of Glasgow; and, the insurance being against fire, among other risks, the vehicle was destroyed by fire which occurred at the place where the vehicle was in fact garaged, and not at the place where the assured had said it would usually be garaged. The House of Lords by a majority decided that the assured's claim failed. On those facts it mattered little whether the answers of the assured were warranties or descriptions of the risk, because if there is an insurance against loss of a vehicle by fire in one place, and the vehicle is destroyed by fire in another place, it seems obvious that the risk which has destroyed it is not the risk insured against. Therefore it seems to me that the question which we have to decide, and which was decided in *Farr* v. *Motor Traders Mutual Insurance Society* (1), did not come up for decision in *Dawsons, Ld.* v. *Bonnin.* (2) The House of Lords gave long consideration to the effect of general clauses in policies of insurance, but although *Farr's* case (1) was cited in argument it is not noticed in any of the judgments, no doubt because it was unnecessary for their Lordships to express any opinion on the point we are now considering.

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(1) 96 L. J. (K. B.) 590.
(2) [1920] 3 K. B. 669.
(3) [1922] 2 A. C. 413.

Four or five years after the decision in *Dawsons, Ld.* v. *Bonnin* (2), the Court of Appeal in *Roberts* v. *Anglo-Saxon Insurance Association* (3) re-affirmed the view it had expressed in *Farr's* case. (1) Incidentally the facts in the present case suggest a clear illustration of the difference between clauses which are conditional and those which are merely descriptive. The third question and answer in the proposal form were, "State towns or localities where vehicles will be used?" Answer, "Abercarn and district." Suppose that during the currency of the policy the vehicle had gone outside the district of Abercarn; and that six months later a collision occurred within that district and the vehicle was damaged. If the answer were a warranty or condition the question in the case would be: Has the vehicle during the policy been used outside the district of Abercarn? If the answer were merely descriptive of the risk, the question in the case would be: Did the collision happen within the district of Abercarn? In the latter case the fact that six months before the accident the vehicle had gone outside the district would be no reason why the insurance company should not pay for a loss occurring while the vehicle was carrying goods within the district.

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(1) [1920] 3 K. B. 669.
(2) [1922] 2 A. C. 413.
(3) 96 L. J. (K. B.) 590.

In my view we ought to follow the two decisions of this Court, and this appeal should be dismissed.

LAWRENCE L.J. I agree. The sole question to be determined in this case is one of construction—namely, whether the following questions and answers in the proposal: "State (*a*) the purposes (in full) for which the vehicle will be used?" Answer, "Delivery of coal," and "(*b*) the nature of the goods to be carried?" Answer, "Coal"—amount to an undertaking by the assured that during the currency of the policy the insured vehicle should be used only for the purpose of the carriage and delivery of coal, or whether the questions and answers mean that the vehicle should only be insured when it is engaged in carrying or delivering coal—to state it in another way, whether there was a warranty by the assured that he would use the insured car for the carriage and delivery of coal and for no other purpose, or whether the questions and answers were merely intended to be descriptive of the risk, indicating that the car would only be covered whilst engaged in carrying or delivering coal.

Now similar questions have arisen in various reported cases, and particularly in *Farr's* case (1); *Dawsons'* case (2); and *Roberts'* case. (3) *Farr's* case (1) and *Roberts'* case (3) are examples of cases in which it has been held that statements in the proposals (although described as warranties) were merely descriptive of the risk insured against, and *Dawsons'* case (2) is an example of a case in which the statement in the proposal was treated as a warranty. *Farr's* case (1) and *Roberts'* case (3) are in my opinion distinguishable from *Dawsons'* case. (2) In *Dawsons'* case (2) the question asked was where the car was going to be usually garaged, and the assured in answer to that question indicated a certain address. As a matter of fact it was not the intention of the assured to garage the car at the address indicated and it never was garaged there. It was not contended in that case that the statement was descriptive of the risk, the sole contention being that it was not a material statement going to the root of the contract ; but the majority of the House of Lords held that, although the statement might not in fact be material, yet by the express agreement of the parties it had been made the foundation of the contract, and that therefore the policy was avoided.

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(1) [1920] 3 K. B. 669.
(2) [1922] 2 A. C. 413.
(3) 96 L. J. (K. B.) 590.

Now that case seems to me to differ from the present case. Admittedly the question in every case is one of the construction of the particular policy, and Scrutton L.J. has referred to the view taken by this Court of the true construction of policies which closely resemble the policy in the present case ; indeed in *Roberts*' case (1), Bankes L.J., in giving the leading judgment, after referring to *Farr's* case (2), said : "In this class of policy when persons insert clauses, whether described as warranties or whether described as part of the description of the vehicle, indicating that the vehicle is to be used in some restricted way, my opinion in that case, and in this case and in similar cases, is and would be that the parties had used that language as words descriptive of the risk, and that, as a result, when the vehicle is not being used in accordance with the description it is not covered by the policy ; but it does not follow at all that because it is used on some one occasion, or on more than one occasion, for other than the described use, the policy is avoided."

No such question as that arose or could on the facts have arisen in *Dawsons*' case (3) at all. It was common ground in that case that the statement that the car would be usually garaged at a certain place imposed a condition which would have to be complied with by the assured throughout the currency of the policy ; and that in fact it amounted to a

(1) 96 L. J. (K. B.) 590, 591.

(2) [1920] 3 K. B. 669.

(3) [1922] 2 A. C. 413.

definite undertaking on the part of the assured that the car would be usually garaged at that place.

Now Mr. Wallington has strenuously contended that *Farr's* case (1) was virtually overruled by *Dawsons'* case. (2) I agree, of course, that although the House of Lords did not purport expressly to overrule *Farr's* case (1), yet if the decision in *Dawsons'* case (2) is inconsistent with *Farr's* case (1) this Court is bound to follow *Dawsons'* case. (2) In my judgment, however, *Dawsons'* case (2) is not inconsistent with *Farr's* case (1) or with *Roberts'* case (3), as the question which arose and was decided in the two latter cases was not raised or decided in the former. In *Dawsons'* case (2) it was quite immaterial whether the statement amounted to a description of the risk or to a warranty, because as already stated the car was not in fact usually garaged at the stated address, and the fire occurred while it was garaged somewhere else. As I have already explained, the only point decided in that case was that on the true construction of the particular contract there in question it was made a fundamental condition of liability under the policy that the car should be usually garaged at a particular place throughout the currency of the policy.

In the present case, I am of opinion that on the true construction of the particular contract with which we are concerned the relevant questions and answers in the proposal amount to nothing more than a description or definition of the risk intended to be insured against, and that, as the accident occurred while the car was in the course of delivering coal and was therefore within the risk at the time, the decision of Rowlatt J. was right, and consequently this appeal fails.

SLESSER L.J. I have found considerable difficulty in this case, because it is not clear to my mind that the majority of their Lordships in *Dawsons, Ld.* v. *Bonnin* (2) have not laid down principles which are inconsistent with the decisions of this Court in *Farr* v. *Motor Traders Mutual Insurance*

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(1) [1920] 3 K. B. 669. (2) [1922] 2 A. C. 413.
(3) 96 L. J. (K. B.) 590.

Society (1) and *Roberts* v. *Anglo-Saxon Insurance Association* (2); but I have come to the conclusion that this appeal should be dismissed for the following reason.

In *Farr's* case (1) it was clearly and definitely decided that words similar to those which have been under discussion refer to the description of the risk insured against, and do not constitute such a warranty or condition as to go to the root of the whole contract of insurance. That view has been rendered less clear to my mind by certain observations in the House of Lords in *Dawsons, Ld.* v. *Bonnin* (3), and particularly by a passage in the speech of Lord Cave (4) which, if it relates specially to conditions precedent and not generally to the effect of misstatements upon the validity of a contract, throws some doubt upon the clear statement of principle in *Farr's* case. (1) Lord Cave's words are as follows: "When a document consisting partly of statements of fact and partly of undertakings for the future"—which exactly describes the document in the present case—"is made the basis of a contract of insurance, this must (I think) mean that the document is to be the very foundation of the contract, so that if the statements of fact are untrue or the promissory statements are not carried out, the risk does not attach." There are similar passages in the speeches of Lord Haldane and Lord Dunedin (5), which I need not cite. But in *Roberts* v. *Anglo-Saxon Insurance Association* (2), some five years after the decision in the House of Lords, this Court unequivocally reaffirmed what they had said in *Farr's* case. (1) Now, from the mere fact that the report of *Roberts*' case (2) makes no mention of the decision of the House of Lords, I cannot assume that the learned judges in this Court had not fully considered the matter in all its bearings. Rather I must take it that, having done so, they came to the conclusion that the distinction drawn in *Farr's* case (1) between words which are conditional and words which are merely descriptive is a valid and existing distinction which ought to be reaffirmed. In the circumstances I feel bound to follow the decision of this Court in *Roberts*' case, and to hold that this appeal should be dismissed.

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(1) [1920] 3 K. B. 669.
(2) 96 L. J. (K. B.) 590.
(3) [1922] 2 A. C. 413.
(4) Ibid. 432.
(5) *See* [1922] 2 A. C. 425, 435.

Appeal dismissed.

Solicitor for appellants: *J. Murray Napier, for C. James Hardwicke & Co., Cardiff.*

Solicitors for respondents: *Collyer-Bristow & Co., for D. Granville West, Newbridge.*

W. H. G.

IBERIAN TRUST, LIMITED *v.* FOUNDERS TRUST AND INVESTMENT COMPANY, LIMITED.

1932
Feb. 22, 26.

Practice—Attachment—Order against Corporation—" Order . . . . to do an Act "—Order not served within Time limited to do the Act—Order not Indorsed with Memorandum as to Penal Consequences of Disobedience—Disobedience—Enforcement by Attachment of Director—Rules of Supreme Court, 1883, *Order* XLI., *r.* 5; *Order* XLII., *r.* 31.

The plaintiff company, which had transferred certain shares in another company to the defendant company upon certain terms, brought an action against the defendant company in order to recover a certain proportion of those shares, and obtained an order against the defendant company for the " return " of those shares within fourteen days of the date of the order. That order was not served upon the defendant company or its directors until the lapse of six weeks from the date of the order. The copy of the order which was served upon the defendant company and upon its directors did not have indorsed upon it, as required by Order XLI., r. 5, a memorandum stating the penal consequences of disobedience to the order. The defendant company having failed to comply with the order the plaintiff company sought to enforce the order by attachment of two of the directors of the defendant company under Order XLII., r. 31:—

Held, (1) that the judgment or order for the " return " of the shares was not a judgment or order to do an act and therefore could not be enforced by attachment.

(2.) That the order was unenforceable also, because it was not served on the defendant company or its directors until after the expiration of the time limited by the order for the " return " of the shares. *Duffield* v. *Elwes* (1840) 2 Beav. 268 followed.

(3.) That the order could not be enforced by attachment of the directors of the defendant company, because they had not been served with a copy of the order indorsed with a memorandum as to the penal consequences of disobedience, as required by Order XLI., r. 5.

(4.) That the remedy against a director of a company by attachment given by Order XLII., r. 31, was an alternative remedy, and the plaintiff company could not pursue that remedy unless they were also in a position to proceed against the defendant company, and that they could not do because the copy of the order served upon the defendant company did not comply with Order XLI., r. 5.

SUMMONS heard before Luxmoore J. sitting as an additional judge of the King's Bench Division.

The summons was taken out by the Iberian Trust, Ld., for leave to issue writs of attachment against Alfred Ernest Holt and John William Watson Shuttleworth, directors of the Founders Trust and Investment Company, Ld., on the ground that that company had not complied with an order made against it by Rowlatt J. on July 7, 1931.

By an agreement dated January 14, 1929, made between the Iberian Trust, Ld., and the Founders Trust and Investment Company, Ld., the Iberian Trust, Ld., agreed that, in consideration of the Founders Trust Company undertaking to procure that a company known as Radium Springs, Ld., would be in receipt of sufficient capital to carry on its business and to meet its obligations, the Iberian Trust, Ld., would cause to be allotted or transferred to the Founders Trust Company such numbers of preferred and deferred shares in Radium Springs, Ld., as should be equivalent to 22½ per cent. of the total amount of financial assistance the Founders Trust Company should procure for Radium Springs, Ld. It was also agreed that the Founders Trust Company should receive 33⅓ per cent. of their commission in preferred shares and 66⅔ per cent. in deferred shares in Radium Springs, Ld.

The Iberian Trust, Ld., by letter dated March 18, 1929, addressed to Radium Springs, Ld., caused to be allotted or transferred to the Founders Trust Company 13,000 preferred shares and 300,000 deferred shares in Radium Springs, Ld., which were the property of the Iberian Trust, Ld.

The Iberian Trust, Ld., brought an action against the Founders Trust Company in which they alleged that the Founders Trust Company had not procured financial assistance for Radium Springs, Ld., in pursuance of the agreement, or that they had only procured financial assistance to a limited extent, and they claimed that they were entitled to the return of all the shares with the exception of 1820 preferred shares and 42,000 deferred shares which represented 22½ per cent. of the financial assistance procured by the Founders Trust Company for Radium Springs, Ld. The Iberian Trust, Ld., accordingly claimed a declaration that they were entitled to the return of 11,180 preferred shares and 258,000 deferred shares in Radium Springs, Ld.

The action was tried before Rowlatt J., who on July 7, 1931, gave judgment for the plaintiffs for a declaration that they were entitled to the return by the defendants of the 258,000 deferred shares and 11,180 preferred shares in Radium Springs, Ld., within fourteen days.

The operative part of the order, which was dated July 7, 1931, was as follows: "It is this day hereby adjudged and declared that the plaintiffs are entitled to the return by the defendants of the following shares, viz., 258,000 deferred shares and 11,180 preferred shares in Radium Springs, Ld., within 14 days from the date hereof. And it is further adjudged that the plaintiffs do have a return of the said shares within 14 days from the date hereof."

A copy of the order, dated July 7, 1931, was served upon Alfred Ernest Holt on August 19, 1931, at the registered offices of the Founders Trust Company, and a copy of the order was served upon J. W. W. Shuttleworth on November 7, 1931. In neither case did the order have an indorsement on it of a memorandum as to the consequences of disobedience such as is required by Order XLI., r. 5, of the Rules of the Supreme Court. (1)

(1) Rules of the Supreme Court: Order XLI., r. 5: "Every judgment or order made in any cause or matter requiring any person to do an act thereby ordered shall state the time, or the time after service of the judgment or order, within which the act is to be done, and upon the copy of the judgment or order which shall be served upon the person required to obey the same there shall be indorsed a memorandum in the words or to the effect following, viz.:—

"If you, the within named A. B., neglect to obey this judgment [or order] by the time therein limited, you will be liable to process of execution for the purpose of

The Founders Trust Company did not comply with the order and transfer the shares.

On June 18, 1930, when the action was commenced by the Iberian Trust, Ld., against the Founders Trust Company the directors of the defendant company consisted of A. E. Holt, J. W. W. Shuttleworth and two others, one of whom resigned his directorship on December 12, 1930, and the other went to America at some time after August 7, 1930, and the remaining directors were not aware of his address.

According to a statement in Holt's affidavit a Board meeting of the defendant company was held on February 19, 1931, at which it was resolved that all the shares of Radium Springs, Ld., should be handed over to him and his son as security against their loans to the defendant company and that transfers of the shares were to be executed by the defendant company whenever desired by Holt and his son, and that a formal document of charge was to be prepared. The share certificates were there and then placed in Holt's custody and had remained with him ever since, and Holt held same on behalf of himself and his son, but no transfer or document of charge had ever been prepared.

The shares claimed by the Iberian Trust, Ld., and referred to in the judgment of Rowlatt J., were comprised in two share certificates each for a larger number of shares than those ordered to be returned under the order, one being a certificate for 13,000 preference shares of Radium Springs, Ld., and the other a certificate for 300,000 deferred shares in that company.

Shuttleworth in his affidavit said that he was willing to comply with the terms of the judgment but that it was not in his power to do so, as the shares were in the possession of

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compelling you to obey the same jugdment [or order].' "

Order XLII., r. 31: "Any judgment or order against a corporation wilully disobeyed may, by leave of the Court or a judge, be enforced by sequestration against the corporate property, or by attachment against the directors or other officers thereof, or by writ of sequestration against their property."

his co-director Holt as security for advances made by Holt and his son to the defendant company.

J. W. Morris and *P. R. E. Browne* for the Iberian Trust, Ld. The order of Rowlatt J. dated July 7, 1931, must be construed as an order requiring the Founders Trust Company to return the shares mentioned in the order, otherwise the order would have no meaning. It is the duty of the person who is required to do an act, and against whom an order has been made, to find out himself the proper mode of complying with the order: *Attorney-General* v. *Walthamstow Urban Council* (1); *Lewis* v. *Pontypridd, Caerphilly, and Newport Ry. Co.* (2) If the order of July 7, 1931, is one requiring the Founders Trust Company to do an act, i.e., transfer the shares, the order has been wilfully disobeyed within the meaning of Order XLII., r. 31, of R. S. C. The expression "wilfully" in that rule only excludes a casual or accidental omission: see *Stancomb* v. *Trowbridge Urban Council.* (3) If the order of July 7, 1931, has been wilfully disobeyed, then the directors of the Founders Trust Company are liable to attachment. There is no rule requiring service on the directors of the judgment. *McKeown* v. *Joint Stock Institute, Ld.* (4), however, shows that directors should in practice be served with the order which requires that the act should be done, and this was in fact done in the present case. If the directors of a company are served with a copy of the judgment, there is no rule which requires that the memorandum set out in Order XLI., r. 5, should be indorsed on the copy so served. Order XLI., r. 5, by its terms does not apply; that rule only applies where the judgment or order is made against a person who is himself a defendant in the cause or matter requiring that person to do an act thereby ordered, because the notice required to be indorsed on the copy of the judgment or order served upon the person refers to "you, the within named A. B." The directors of the Founders Trust Company are not named in the judgment and are not liable for costs. The language of

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(1) (1895) 11 Times L. R. 533.

(2) (1895) 11 Times L. R. 203.

(3) [1910] 2 Ch. 190, 194.

(4) [1899] 1 Ch. 671.

Cozens-Hardy L.J. in *In re Tuck* (1) indicates that Order XLI., r. 5, applies only to a defendant. If proceedings by way of sequestration had been taken against the property of the company, it might perhaps have been contended that there had not been a proper service of a copy of the judgment owing to the omission therefrom of the indorsement of the memorandum. But this fact does not alter the point that the order of the Court has been wilfully disobeyed. The directors of the Founders Trust Company, by their affidavits, adhere to their intention not to transfer the shares, and do not take the point that they were unaware of the consequences of non-compliance with the order. In these circumstances the Court can say that there has been a waiver of the strict requirements of the rule: see *Rex* v. *Poplar Borough Council* (*No.* 2). (2)

Hon. S. O. Henn Collins for Holt. These proceedings for attachment are entirely misconceived. Assuming that service of the order dated July 7, 1931, on Holt, who was the chairman of the Founders Trust Company, at the offices of that company on August 19, 1931, was service on the company, that service was ineffectual, because the time limited by the order—namely, fourteen days from the date of the order—within which the shares were to be returned had already expired when the order was served. It was held in *Duffield* v. *Elwes* (3) that an order limiting the time within which an act was required to be done should be served so as to make it possible for the person upon whom it is served to obey it within the time limited, and that if the order is not served upon the person till after the expiration of the limited time he cannot be said to be guilty of contempt or disobedience by not doing the act within the limited time. The plaintiffs, therefore, could not proceed to enforce the order by sequestration of the property of the Founders Trust Company, and the directors of that company cannot be in a worse position than the company itself, and an individual director could not be guilty of contempt for not obeying the order. The action was against the company and the judgment was against the company; the party proceeding to enforce that judgment must be in a position to enforce it against the company before proceeding to enforce it against the directors of the company under Order XLII., r. 31. The right under that rule to enforce a judgment against a company by attachment against the directors of the company is not a different right to that against the company, but an alternative remedy for the same right. The order of July 7, 1931, was one which could not be enforced. It did not order the company to do anything; it merely ordered the return of a certain number of shares. The plaintiff company were not entitled to any particular shares, but only to a certain number of shares out of a larger number, and therefore they could not claim a transfer of certain specified shares. Order XLI., r. 5, of the Rules of the Supreme Court provides that where a judgment or order requires a person to do an act, the copy of the judgment or order served upon the person required to do the act shall have indorsed upon it a memorandum stating the penal consequences to which he would be liable for disobedience. Under Order XLII., r. 31, a judgment or order against a corporation wilfully disobeyed may be enforced by sequestration of the property of the company or by attachment against the directors. Before the property of the company can be sequestrated a copy of the judgment or order must be served upon the company with a memorandum of the penal consequences indorsed upon it. That was not done in this case. There is no provision in the order requiring service upon a director of a copy of the judgment or order properly indorsed with the memorandum required by Order XLI., r. 5, before proceeding by way of attachment against him, but it was held in *McKeown* v. *Joint Stock Institute, Ld.* (1) that obedience to an order made against a corporation will not be enforced, under r. 31 of Order XLII., by the attachment of a director of the corporation, unless the order has been served personally upon the director. That must mean a copy of the order with the memorandum required

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(1) [1906] 1 Ch. 692, 696.

(2) [1922] 1 K. B. 95, 108, 112, 119.

(3) 2 Beav. 268.

(1) [1899] 1 Ch. 671.

by Order XLI., r. 5, indorsed upon it. It is not obligatory to serve a copy of the judgment upon a director of a company if it is not intended to enforce against him personally a judgment obtained against the company, but if it is intended to enforce the judgment against the director he must be told what his position will be if he does not obey the order.

F. G. Enness for Shuttleworth adopted the argument put forward on behalf of Holt.

P. R. E. Browne replied.

LUXMOORE J. The Iberian Trust, Ld., by this summons ask for leave to issue writs of attachment against Alfred Ernest Holt and John William Watson Shuttleworth, as directors of the Founders Trust and Investment Company, Ld., because that company have not complied with an order made against it on July 7, 1931, by Rowlatt J. [His Lordship, having stated the facts and the form of the order, continued :] The form of the order is a little unfortunate, because, although one may understand what is intended by it, it certainly does not define the precise steps which are to be taken to bring about the transfer of the legal title to the shares in question from the defendant company to the plaintiff company. I think that the proper form of order would have been for a declaration that so many shares standing in the name of the defendant company are the property of the plaintiff company, followed by an order on the defendant company to execute a proper transfer of those shares to the plaintiff company, or as it should direct, such transfer to be settled by the judge in case the parties disagree. There has, in fact, been no transfer of shares by the defendant company, although the plaintiff company appear to have pressed for the transfer of the shares.

The plaintiff company ask for leave to issue writs of attachment against the two directors under Order XLII., r. 31. That rule is as follows : "Any judgment or order against a corporation wilfully disobeyed may, by leave of the Court or a judge, be enforced by sequestration against the corporate property, or by attachment against the directors or other officers thereof, or by writ of sequestration against their property." From this it appears that in order to constitute a contempt of Court for which the directors may be punished there must be wilful disobedience either by the company or its servants or directors to do something which it has been ordered to do. Now, turning back to Rowlatt J.'s order, what is it that the defendant company have been ordered to do which the company and its directors have failed to do ? In terms, the order does not direct the defendant company to do anything—it says : "that the plaintiffs do have a return of the said shares within fourteen days." Am I to spell out of that an order on the defendant company to do something ? I think not. If the Court is to punish any one for not carrying out its order the order must in unambiguous terms direct what is to be done. In saying this I do not intend to say anything contrary to what was said by Chitty J. in *Attorney-General* v. *Walthamstow Urban Council* (1), that it was the duty of the defendants to find out the proper means of obeying the order. Of course, there is such a duty on a defendant where the order either prohibits or orders the doing of a specific act. In the case mentioned the order restrained the defendant council from discharging sewage into a particular brook so as to create a nuisance. That was definite enough in its terms. The defendant council were, as I gather, unable to prevent discharge of sewage into the brook so long as the existing system of drainage or sewage disposal was used by them. The defendant council admitted that they were trying to find a solution of the difficulty while still retaining the existing system. Here, the order does not even provide that the defendant company shall return the shares. What it says is "that the plaintiffs do have a return of the said shares within fourteen days." Personally, I do not think that even an order on the defendant company to return the shares would be sufficiently definite to be enforced by penal proceedings. But the actual order is far more ambiguous than that ; the order is no more an order to do an act than an order that the plaintiff is to recover something from the defendant is an order upon the defendant to do an act. It was held by the Court of Appeal in *In re Oddy. Major* v. *Harness* (1) that an order to recover money is not an order on the defendants to do anything, and therefore that such order could not be enforced either by a supplementary order for the payment of the money within a fixed time, or by attachment.

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(1) 11 Times L. R. 533.

In my judgment, before the order in the present case be enforced against the defendant company or its directors it is necessary for the plaintiff company to obtain a supplementary order requiring the defendant company and its directors and secretary, within a limited time, to execute a proper transfer of the shares to the plaintiff company. The supplementary order should provide that the transfer should be settled by the judge in case the parties differ.

This, however, is not the only objection to the order, and for the purposes of the rest of my judgment I shall assume, contrary to the opinion already expressed, that the order is one which orders the defendant company to do an act—namely, the execution of the transfer of the shares in question. The first question which arises is: whether this judgment has been served on the defendant company within the time limited by the order for the doing of the particular act? The order in question, which is dated July 7, 1931, was not served upon the defendant company and upon Mr. Holt until August 19, 1931. It was not served on Mr. Shuttleworth until November 7, 1931. So that in each case the time limited by the order for the doing of the act had in fact expired. I think it is quite plain from the decision in *Duffield* v. *Elwes* (2) that that order could not be enforced by penal proceedings, because there can be no default in compliance with an order ordering something to be done within a certain time when the order was not served until after the time within which the act was to be done has expired. That again would be a complete answer to the application for attachment in this case.

(1) [1906] 1 Ch. 93.

(2) 2 Beav. 268.

But the matter does not end there; there is a further objection which I think I must deal with, because it raises a question of some importance. The order when it was served on the defendant company and on the directors had no indorsement on it such as is required by Order XLI., r. 5. That rule is as follows: "Every judgment or order made in any cause or matter requiring any person to do an act thereby ordered shall state the time, or the time after service of the judgment or order, within which the act is to be done, and upon the copy of the judgment or order which shall be served upon the person required to obey the same there shall be indorsed a memorandum in the words or to the effect following, viz.: 'If you, the within named A. B., neglect to obey this judgment [*or* order] by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the same judgment [*or* order].'" It is to be noticed that the form of the memorandum is not in any sense a rigid form. It may be altered so long as the effect is in substantial accord with the form. This must give such latitude as is necessary to meet the facts of the particular case. The object of the indorsement is plain—namely, to call to the attention of the person ordered to do the act that the result of disobedience will be to subject him to penal consequences. In the present case it is admitted that no steps can be taken to sequestrate the property of the company, because the order served on it was not indorsed as required by Order XLI., r. 5. It is admitted that service on the defendant company is necessary as a preliminary to enforcement of the order by sequestration. It is argued, however, that Order XLI., r. 5, does not apply to a director of a defendant company who is himself not a defendant to the action. The Orders of the Supreme Court do not, in fact, require service of a copy of the judgment or order on a person who is not required by the order to do a particular act. But in practice the Courts have always required that the order to be enforced should be personally served on the director before it would be enforced against him by attachment. As an authority for this proposition I refer to the decision of North J. in

McKeown v. *Joint Stock Institute, Ld.* (1) In my judgment, the order so served should, as a preliminary to its enforcement against the directors, be indorsed with a notice to the effect of the memorandum prescribed by Order XLI., r. 5, including in it the name of the particular director served. So far as my experience goes this has been the practice in the Chancery Division.

But apart from this, the remedy against the directors of the company under Order XLII., r. 31, is an alternative one, and I do not see how it can be applicable unless the plaintiffs be in a position to pursue the original remedy against the defendant company. In my judgment, on this ground also, the plaintiff company is not in a position to ask for leave to issue writs of attachment against Holt and Shuttleworth.

The objections I have dealt with are, of course, purely technical. The respondents Holt and Shuttleworth have each sworn affidavits. Mr. Holt says that he has a charge upon the shares in question. In para. 13 of his affidavit he says that at a board meeting of the defendants held on February 19, 1931, it was resolved that all the shares of Radium Springs, Ld., " should be handed over to me and my son, as security against our loans to the defendants and that transfers of the shares were to be executed by the defendants whenever desired by myself and my son and that a formal document of charge was to be prepared. The share certificates were there and then placed in my custody and have remained with me ever since, and I hold same on behalf of myself and my son, but no transfer or document of charge has ever been prepared." I have seen a copy of the minute of that meeting, and it appears that only two directors were present at that meeting, of whom one was Mr. Holt, and it would, therefore, seem that the resolution was invalid so far as any charge in his favour was concerned, but it might be valid so far as it authorized a separate charge to be given to Mr. Holt's son. It, however, appears that there are only two directors now. Any transfer of the shares in order to be validly executed must be executed under the seal of the company, and a resolution of the Board in the presence of such persons as may be required to comply with the provisions of art. 71, Table A of the Companies Act, which govern the defendant company. I am unable to say what form of transfer is required by the articles of the Radium Springs, Ld. Mr. Holt, in his affidavit, has claimed that the charge in his son's favour makes it impossible to transfer the shares to the plaintiff company. For the reasons I have stated, I do not think this charge is valid so far as Mr. Holt is concerned, but it may be valid so far as his son is concerned. If the charge in favour of the son is valid it would certainly make a compliance with the order a matter of difficulty. Mr. Shuttleworth says that he is ready to do what is necessary to transfer, but that he cannot do so because of the claims of Mr. Holt and his son. There may be grounds, therefore, for saying that the refusal to hold a meeting of the defendant company and pass a resolution for the transfer of the shares was not in fact wilful.

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(1) [1899] 1 Ch. 671.

In my judgment this application for leave to issue writs of attachment against Mr. Holt and Mr. Shuttleworth for disobedience to the order is misconceived and must be dismissed. The plaintiffs must pay the costs.

Application dismissed.

Solicitors for plaintiff company: *Churchill, Clapham & Co.*
Solicitors for Holt: *Biddle, Thorne, Welsford & Gait.*
Solicitor for Shuttleworth: *H. Davis.*

R. F. S.

1932
April 8, 14.

OCEAN ACCIDENT AND GUARANTEE CORPORATION, LIMITED AND ANOTHER *v.* COLE.

Motor-car—Insurance—Certificate of Insurance—Falsity—" To his knowledge false "—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43) *s.* 112, *sub-s.* 3.

An insurance company issued a public liability motor-car policy of insurance covering third-party risks, valid for a year and any further period for which they might accept payment for renewal. The policy was subject to a condition that no liability should arise until payment of the premium. At the expiration of the year, on June 3, no premium was paid, but it was paid on June 11, when a receipt was given acknowledging a renewal of the policy as from June 3. On the former date the company also issued a certificate of insurance containing the statement alleged to be false, that the date of commencement of the insurance was June 4.

Held, that even assuming the statement to be false in fact, that alone was not sufficient to justify a conviction for issuing a certificate which was false to the knowledge of the company within the meaning of s. 112, sub-s. 3 of the Road Traffic Act, 1930, and that the conviction must be quashed.

Case stated by Leicester City justices.

At a court of summary jurisdiction, sitting at Leicester on July 31, 1931, an information was preferred by the respondent, Oswald John Buxton Cole, under s. 112, sub-s. 3, of the Road Traffic Act, 1930 (20 & 21 Geo. 5, c. 43), against the appellants, the Ocean Accident and Guarantee Corporation, Ld., and the appellant, Charles Albert Green, for that the appellants on June 11, 1931, did issue to one Frank Payne a certificate of insurance under Part II. of the said Act, which to the knowledge of the appellants was false in a material particular, contrary to the above sub-section, and that the above mentioned Green did aid and abet in the commission of the said offence.

The following facts were proved or admitted. Prior to June 3, 1931, the appellant corporation had issued to Payne a public liability motor-car policy of assurance, whereby Payne was indemnified against third-party claims for a period ending on June 3, 1931, " and during any period for which the corporation may accept payment for the renewal of this policy . . . . subject to the terms exceptions and conditions contained herein." By condition 3 of the General Conditions contained in the policy: "No liability shall arise until the premium due has been paid and accepted." No premium was paid in respect of any period of insurance subsequent to June 3, 1931, until June 11, 1931, when the premium due was paid by Payne and accepted by the corporation, who gave a receipt in the following terms: "Received this 11th day of June, 1931, the sum stated below, being the premium for the renewal of the undermentioned policy as from June 3, 1931, to noon of June 3, 1932." The corporation on that date, June 11, also issued a certificate of insurance to Payne, containing the statement, "Date of commencement of insurance June 4, 1931."

On the part of the respondent it was contended that by reason of condition 3 above mentioned Payne ceased to be insured on June 3, 1931, and continued uninsured until he paid and the corporation accepted the premium on June 11, and that the date of commencement of insurance should have been stated in the certificate as June 11, 1931.

The appellants contended that by accepting the premium they had renewed the policy and accepted all risks thereunder as from the termination of the last period of insurance, namely, June 3, and that therefore the statement in the certificate as to the date of commencement of the insurance was correct.

The justices convicted the appellants and fined them 50*l.*, but stated this case.

Croom-Johnson K.C. and *Stimson* for the appellants. There was no evidence before the justices upon which they could find that the statement in the certificate of insurance of the date of commencement of insurance was false to the knowledge of the appellants. By reg. 4 (i) (*a*) of the Motor Vehicles (Third Party Risks) Regulations, 1930 (S. R. & O., 1930, No. 1097), insurers must issue a certificate of insurance in the form (Form A) set out in the Schedule to the regulations. In Form A they must (inter alia) set out the "Date of commencement of insurance." Nothing is said about setting out the date of payment of the premium. The liability of the appellant corporation, on the payment of the premium, related back to the date of termination of the old policy, and they so stated in the receipt they gave Payne. Therefore the certificate complied with the form prescribed by the regulations.

Willes for the respondent. There was an absolute statutory obligation on the appellants to write into the certificate of insurance such particulars only as were true, among them the date at which there was an insurance. The statement that the date of the commencement of insurance was June 4 was untrue, because on that date and up to June 11, Payne, by the terms of the policy itself, was not insured, and neither on June 4 nor on any date before June 11 had the insurance commenced: *Tarleton* v. *Staniforth.* (1) The acceptance of the premium on June 11 had no retrospective effect as regards liability: *Sickness and Accident Assurance Association* v. *General Accident Assurance Corporation.* (2) In view of condition 3 the effect of the statement in the policy that the assured had paid or agreed to pay the premium was to fix the date from which the life of the policy was to be measured as June 3, and the date at which liability should arise as June 11. The appellants were not bound to renew the policy at all, and might have refused to do so. They cannot be heard to say that they did not know the law applicable to their policy.

No reply was called for.

LORD HEWART C.J. This is a case stated arising out of an information preferred under the Road Traffic Act, 1930, by the present respondent against the Ocean Accident and Guarantee Corporation, Ld., and Charles Albert Green, "for that the said corporation on or about the 11th day of June, 1931, unlawfully did issue to one Frank Payne a certificate of insurance under Part II. of the Road Traffic Act, 1930, which to the knowledge of the said corporation was false in a material particular, contrary to s. 112, sub-s. 3,

(1) (1794) 5 T. R. 695.

(2) (1892) 19 R. 977.

of the Road Traffic Act, 1930," and with regard to Charles Albert Green that he "unlawfully did aid, abet, counsel and procure the said corporation to do and commit the said offence." The court of summary jurisdiction convicted the appellants, and the question for this Court is whether they were right in law in so doing.

The facts are not really in dispute. Before June 3, 1931, the appellant corporation had issued to Frank Payne a public liability motor-car policy of insurance whereby he was indemnified in respect of his motor-car against third-party claims for a period ending June 3, 1931, and during any period for which the appellant corporation might accept payment for the renewal of the policy, subject to the terms, exceptions and conditions contained in it and indorsed upon it. One of those conditions, and a very important one, was that no liability should arise until the premium due had been paid and accepted. In fact no premium was paid under that policy in respect of any period of insurance later than June 3, 1931, until a payment was made on June 11, 1931, and on June 11, 1931, the premium, diminished by what is called the "no claim" bonus, was paid, and thereupon the corporation issued a certificate in which the date of the commencement of the insurance was described as June 4, 1931. The allegation on the part of the respondent is that under s. 112, sub-s. 3, of the Act a certificate of insurance had been issued, which to the knowledge of the persons issuing it was false in a material particular.

The argument—if I may say so, the very able argument—of Mr. Willes, for the respondent, has given rise to important questions which may hereafter fall for careful consideration. I propose to deal in this case only with the question which the case itself involves. No doubt since the passing of the Road Traffic Act, 1930, new considerations have arisen with regard to policies of insurance. The Legislature has thought fit to provide in the interests of persons using the highway that it shall be a criminal offence to use a motor vehicle upon the highway unless there is in force an effective policy of insurance. Sect. 35, sub-s. 1, of the Act provides: "Subject to the provisions of this Part of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Part of this Act." When one looks at s. 36, sub-s. 5, one finds it is expressly provided that: "A policy shall be of no effect for the purposes of this Part of this Act unless and until there is delivered by the insurer to the person by whom the policy is effected a certificate (in this Part of this Act referred to as a 'certificate of insurance') in the prescribed form and containing such particulars of any conditions subject to which the policy is issued and of any other matters as may be prescribed, and different forms and different particulars may be prescribed in relation to different cases or circumstances." Now the crucial fact is that here there was a lacuna, a gap. The premium was not paid until June 11, and under the policy no liability arose until the premium had been paid and accepted. Nevertheless the certificate said that the date of the commencement of insurance was June 4, seven days earlier. Speaking for myself, I find a difficulty in understanding how a person can be said to be insured if the insurance company has no liability towards him, and I think there is much to be said for the argument of Mr. Willes that this certificate in putting the date of the commencement of the insurance at June 4, 1931, while in truth and in fact the liability did not begin until June 11, 1931, was false. But that is not enough. What is required under this Act by s. 112, sub-s. 3, in order that the offence, for which heavy penalties are provided, may be committed, is that the certificate shall be false to the knowledge of the person issuing it, and the question whether the certificate was false to the knowledge of the corporation and/or of the aider and abettor seems hardly to have been considered in the court below. The court seems to have proceeded upon the simple discrepancy between June 4 and

June 11. I am not going to dwell upon the mischiefs which may arise from antedating certificates of insurance purporting to be given under this statute. It may well be, as Mr. Willes has argued, that if certificates of insurance are antedated, there may be a period during which the assured appears to be insured, while in fact and in truth he is not insured; in other words, a period during which the object of the Road Traffic Act, 1930, in that respect may be defeated. I base my decision simply upon the point that the justices here do not appear to have given weight to the words contained in s. 112, sub-s. 3, that the falsity, if falsity there be, must be falsity to the knowledge of the person issuing the certificate. Upon that ground and upon that ground alone, I think that the appellants here are entitled to succeed.

AVORY J. I agree that the appeal succeeds in this case. We are dealing with s. 112, sub-s. 3, of this Act of Parliament which renders a person liable to imprisonment for a term not exceeding six months if he issues a certificate of insurance which is to his knowledge false in any material particular. In my opinion there was no evidence in this case before the justices that this certificate was false to the knowledge of the appellants in any material particular. The justices proceeded upon the ground that because in their opinion Frank Payne was uninsured till June 11, therefore the statement in the certificate, "Date of commencement of insurance June 4," was false to the knowledge of the appellant corporation. If it were to be assumed that this statement in the certificate was in fact false, that of itself alone is not sufficient to justify the finding that it is false to the knowledge of the appellant corporation; and, indeed, Mr. Willes has admitted that the justices never had their minds directed at all to the question whether, if the certificate were false, it was false to the knowledge of the appellants. Speaking for myself, I am not satisfied that the certificate was false even in fact. With all respect to the interesting argument that we have heard from Mr. Willes, I am not satisfied that Frank Payne was in fact uninsured until June 11. I think that the condition in this policy: "No liability shall arise until the premium due has been paid and accepted," must be read in conjunction with the operating words which create the liability upon the insurance company—namely, the words, "but during the period aforesaid," that is, from June 3 to June 3 in the first year, and "during any period for which the corporation may accept payment for the renewal of this policy," the corporation will, subject to the conditions, indemnify the insured.

Now it appears to me it may well be argued that as soon as they do accept a premium, their liability does attach for the period for which they have accepted payment for the renewal of the policy. The receipt shows clearly, in my opinion, that the company in accepting payment of that premium accepted liability for the period from June 3, 1931. I am not expressing this as a concluded opinion, because it is not necessary in this case, in my view, to express any concluded opinion upon the question of the liability which might arise between the company and the assured. I am satisfied, if there is any doubt upon the matter as a question of law, that we cannot possibly accept the argument of Mr. Willes that persons are liable to be convicted of issuing a certificate which they know to be false in a material particular because they have acted upon a mistaken view of the law. Upon these grounds I agree that this appeal should be allowed and the conviction quashed.

Hawke J. I agree. I do not think that "knowledge" in the sub-section under which this conviction took place has any relation to any presumptions as to knowledge of law. I think that the sub-section requires, in order to support a conviction, knowledge in fact of the falsity of the statement under consideration. It would be impossible in this case to say that this insurance company, or the gentleman who settled the particular certificate, knew that he had said something which he knew to be untrue. It is quite obvious that he believed it to be true, and therefore I think that any prosecution based on the ground that he knew that it was untrue must fail, and I do not think that the magistrates intended to decide anything else. I think they decided that the statement was false to his knowledge, and that they did so, although he believed it to be true, because he disagreed with their views of the law, and I do not think that is sufficient to justify a prosecution under the section.

With regard to the rest of the case I desire to say this, that it is unnecessary to go into the other points in my view, but though I express no considered opinion at the present moment, because it is unnecessary, if I had to do so at the present moment my opinion would be that of Avory J., and I think I may say expressed in the same words.

Appeal allowed.

Solicitors for appellants: *William Hurd & Son, for Herbert Simpson, Son & Bennett, Leicester.*

Solicitors for respondent: *Robinson & Bradley, for Harding & Barnett, Leicester.*

W. L. L. B.

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April 28, 29.

BEST *v.* BUTLER AND FITZGIBBON.

Trade Union—Officer—"Wilfully withhold" Moneys of Trade Union—Necessity for Proof that Money was still in Officer's Possession at Date of Summons—Continuing Offence—Trade Union Act, 1871 (34 *&* 35 *Vict. c.* 31), *s.* 12.

By s. 12 of the Trade Union Act, 1871: "If any officer, member, or other person being or representing himself to be a member of a trade union registered under this Act, ... or any person whatsoever, by false representation or imposition obtain possession of any moneys, securities, books, papers, or other effects of such trade union, or, having the same in his possession, wilfully withhold or fraudulently misapply the same, ..." a court of summary jurisdiction may order such person to deliver up such moneys, etc., to the trade union, and in default of such delivery may order such person to be imprisoned.

Two officers of a trade union were jointly charged with wilfully withholding moneys of the trade union. It was proved or admitted that the whole of the money had been in the possession of one or other of them, but it was contended that the money was not in their possession at the date of the charge, and that that fact was a necessary ingredient of the offence, and further that the information was out of time:—

Held, that the offence of withholding money referred to in s. 12 was a continuing offence; and that it was not necessary to prove that the money was in the possession of the two officers at the date of the charge if there was evidence that money belonging to the trade union had been in their possession and was still being withheld.

Case stated by a Metropolitan police magistrate.

On September 15, 1931, an information was preferred at the Westminster Police Court by the appellant, C. P. Best, on behalf of the Chief Registrar of Friendly Societies under the Trade Union Act, 1871, against the respondents, J. G. Butler and G. Fitzgibbon, for that they on March 30, 1931, did unlawfully wilfully withhold moneys of the Army Clothing Department Employees' Union, a trade union registered under the Trade Union Act, 1871, to wit, the sum of 379*l.* 4*s.* 3*d.*, contrary to s. 12 of the Act. (1)

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(1) Trade Union Act, 1871, s. 12: "If any officer, member, or other person being or representing himself to be a member of a trade union registered under this Act, ... or any person whatsoever, by false representation or imposition obtain possession of any moneys, securities, books, papers, or other effects of such trade union, or, having the same in his possession, wilfully withhold or fraudulently misapply the same, or wilfully apply any part of the same to purposes other than those

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Upon the hearing of the information on September 30, October 14 and 28, 1931, the following facts were proved or admitted :—

The Army Clothing Department Employees' Union was registered under the Trade Union Act, 1871.

At all material times the defendant Butler was the secretary of the union, except April to September, 1926, owing to absence through illness, during which said period the defendant Fitzgibbon handled all moneys received from the collectors, and the defendant Fitzgibbon became the treasurer on June 13, 1924, by resolution of that date.

At all material times it was the secretary's duty to keep a record of income and expenditure, to pay petty cash accounts under 1*l.*, to prepare the annual general statement required by the Trade Union Act, 1871, and to send a copy of this to the Registrar and each member at the appointed time.

At all material times it was the treasurer's duty to receive money from the collectors of contributions to the general fund of the union, to render true accounts of these, and to bank all moneys received at least once a month.

Since June 13, 1924, when the office of treasurer was created, and the defendant Fitzgibbon was appointed, the aforesaid duties were not regularly carried out.

Until 1926 the moneys collected were handed to Butler, and thereafter, save as hereinafter appears, to Fitzgibbon. Fitzgibbon made payments from time to time to Butler for petty cash, but neither of the defendants kept or produced any records of the said payments. Fitzgibbon kept a

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expressed or directed in the rules of such trade union, or any part thereof, the court of summary jurisdiction for the place in which the registered office of the trade union is situate, upon a complaint made by any person on behalf of such trade union, or by the registrar . . . . may, by summary order, order such officer, member, or other person to deliver up all such moneys, securities, books, papers, or other effects to the trade union, or to repay the amount of money applied improperly, and to pay, if the court think fit, a further sum of money not exceeding twenty pounds, together with costs not exceeding twenty shillings; and, in default of such delivery of effects, or repayment of such amount of money, or payment of such penalty and costs aforesaid, the said court may order the said person so convicted to be imprisoned, with or without hard labour, for any time not exceeding three months. . . ."

treasurer's cash-book until 1927, when he discontinued keeping the same, as the accounts were in a state of confusion. This cash-book was destroyed by Fitzgibbon, but all moneys were duly handed over by the collectors and duly recorded in another cash-book which the secretary, i.e., the defendant Butler, had kept in his own handwriting since 1924, inclusive, and had not been handled by any persons other than the defendants. The last mentioned cash-book was produced in evidence.

During the last half-year in 1930 Butler had himself received the collections, and accounted for all the money recorded in the said cash-book as having been received from July 1 to December 31, 1930, with the exception of 29*l.*

A cheque for 32*l.* 10*s.* drawn in respect of Butler's salary on September 30, 1930 (an entry of which appeared in the said cash-book), was never presented, and did not appear in the bank passbook relating to the union's account at Barclays Bank. The said defendant still held the said cheque, which purely on a matter of account could be set up against the 29*l.* referred to in the previous paragraph.

During the period between January 1, 1931, and March 31, 1931, Butler himself received certain collections, but, according to a statement in Butler's own handwriting, which was produced in evidence, the sum of 15*l.* 12*s.* 4*d.* had not been accounted for, and cheques drawn sufficient to cover the said defendant's salary during the said period had been met and included in the account.

The defendant Butler was duly suspended by resolution of a general meeting held on May 6, 1931. The defendant Fitzgibbon was also suspended by resolution of the said general meeting.

Every year Butler had prepared from his cash-book and other sources a draft general statement in manuscript of the accounts of the union made up to December 31 in each year, and submitted it to two lay auditors in March of the following year. The lay auditors were working-men.

At the audits for the years 1924 to 1930, inclusive, the last of which took place on March 6, 1931, the lay auditors checked the receipts from collectors and verified the amounts shown as received in the draft general statement, but did not examine the bank passbook because they trusted Fitzgibbon. Both defendants were present at the audit, save that at the last of all the audits Butler left the room before the checking of the bank balances, and admitted that he had left because he could not stand the strain.

After he had left the room Fitzgibbon held up the bank passbook and purported to read out the balance in the bank on deposit and current account. The figures so read out agreed with the accounts prepared by Butler in manuscript, but in fact the passbook showed different figures. The bank passbook of the trade union was never examined by the auditors. Corrected printer's proofs agreeing with the manuscript accounts were submitted to the committee of the union and afterwards passed at the annual general meetings, at which both the defendants were present. The last annual general meeting was held on March 30, 1931, the date of the alleged offence.

Each of the defendants also signed in their respective capacities annual returns sent to the Registrar of Friendly Societies under the Trade Union Act, 1871, s. 16, for the years ended December 31, 1924–1929, inclusive.

The following discrepancies were proved :—

1. In the annual accounts submitted to members for the years 1929 and 1930 and in that submitted to the Registrar for the year 1929, bank interest was shown as received on the deposit account, whereas there was no deposit account and no interest in fact received. In 1928, 1929 and 1930 interest on a bank overdraft on the current account and bank charges appeared in the bank passbook, but were omitted from the annual accounts.

2. The discrepancies at the material dates between the actual balance of cash in the bank passbook and the amount shown in the manuscript accounts and the annual returns as being the balance in the account at the bank above referred to were set out in a statement which was produced in evidence. In addition to the discrepancies therein set out there were

three cheques amounting in all to 48*l.* 19*s.* 6*d.* which were included in the defendants' manuscript accounts and shown in the cash-book kept and prepared by Butler but not in the passbook. The total discrepancy amounted to 379*l.* 4*s.* 3*d.*

At a special general meeting held on May 6, 1931, at which both defendants were present, the chairman referred to the discrepancy between the amount which was actually in the bank and the amounts which were shown in the accounts which had been submitted to the annual general meeting, and explained that the discovery of the facts had resulted from the chairman having ascertained from a private source that a cheque drawn on the union's bank account had been dishonoured. The defendants were called upon to give their explanations, and both did so in the presence of one another. Fitzgibbon admitted responsibility, and said trouble started in 1926, when secretary made him 70*l.* odd short—he didn't believe he was short but couldn't explain apparent shortage—being then about to appeal to electors in public capacity he felt character would be ruined if it was reported he was short—he promised secretary to pay back—things went bad to worse and unfortunately he tried other means of regaining money. He concluded by saying: "I want to make quite clear to members that there are only two in this—every one else is exonerated—no one else knows anything about it."

Butler was invited to speak—he failed to get satisfactory hearing—he said what money he'd had had been used for union, he asked Mr. Fitzgibbon to name the sum or a sum of what he, the secretary, had received, but Fitzgibbon couldn't say any definite amount. Fitzgibbon said he couldn't give any definite amounts and that he held no receipts for money given to Butler. Butler said he had demanded all money from treasurer since July 1, 1930, but all had been used on behalf of union.

Mr. Lang was present and he pointed to Butler and said: "Have you had all the money?" Butler said: "No." Lang said: "Have you had any money?" Butler shook his head. Lang then asked Fitzgibbon if he had had all the money. He said "No," but he admitted he had had some.

At an interview at the office of the Registrar of Friendly Societies on June 29, 1931, both the defendants and other officers of the union were present for the purpose of testing the accuracy of the annual returns and deciding whether they could be filed. In the course of this interview the defendant Butler admitted that he had committed the original sin of preparing the false balance-sheet on the understanding that the defendant Fitzgibbon would put the matter right and had had to keep on doing so. The defendant Fitzgibbon, while admitting that from 1926 onwards he had read over to the auditors at audits the supposed balance at bank and that he had promised the defendant Butler that he would repay a deficiency of 125*l.*, said that when he had laid the bank passbook on the table in front of the defendant Butler in 1927 the latter had produced accounts which showed a deficiency of that amount of which he knew nothing, but which he was prepared to repay in view of his position in public life. After that had happened he alleged that he had advanced money to the defendant Butler from time to time which was more than sufficient for the union's purposes. The defendant Butler denied that he had received any more than was so required, but admitted that no records of such amounts advanced were in existence. A copy of the note taken at this interview was produced in evidence.

Counsel for the defendant Butler submitted at the close of the complainant's case: (1.) That the summons was bad, because it did not allege that the defendant Butler had the money alleged to be withheld in his possession; (2.) that there was no evidence that the defendant Butler had had the alleged or any sum of money in his possession; (3.) that the information was out of time by virtue of s. 11 of the Summary Jurisdiction Act, 1848, because if the defendant Butler withheld any money it was money which came into his possession more than six months prior to the date on which the information was laid; (4.) that there was no evidence that the defendant Butler withheld any money, because no express demand had been made on him to repay it.

Counsel for the prosecution submitted: (1.) that the allegation of withholding implied an allegation that the money was in the possession of the defendants; (2.) that there was prima facie evidence on which the magistrate should convict the defendants of the offence charged; that if either of the defendants, although himself not withholding the money or any part thereof, had aided, abetted, counselled or procured the other to withhold the same, he was guilty of the offence charged; (3.) that if the magistrate was prima facie satisfied as to the amount jointly withheld he had power to convict and to order the defendants jointly to repay the same and in default of such repayment to order the defendants to be imprisoned, or to order the defendants to repay the same as a civil debt, so that any payment by one defendant would pro tanto discharge the other; (4.) that if the magistrate was not prima facie satisfied as to the withholding of the amount charged or of the exact amount withheld but was satisfied that moneys of the union had been withheld under circumstances importing misconduct not necessarily amounting to an indictable offence he should make no order for repayment but should convict the defendants and fine them or otherwise deal with them in accordance with law; (5.) that the prosecution was not out of time, because withholding was by its nature a continuing offence; (6.) that no demand for repayment was necessary in the circumstances as a condition precedent to the offence of withholding moneys; (7.) that it was not necessary for the magistrate to be satisfied that the defendants or either of them had the actual coins received by them or either of them in their physical possession at the date of the alleged offence; (8.) that if the magistrate was satisfied that the defendants or either of them had received the said moneys or any part thereof he was entitled to find that the said moneys were in the possession of the defendants within the meaning of the section.

The following cases were cited: *Pullen* v. *Carlton* (1); *Wookey* v. *Pole.* (2)

(1) [1918] 2 K. B. 207.

(2) (1820) 4 B. & Ald. 1, 6.

The magistrate held that the summons must be dismissed upon the following grounds:—

(1.) Although there was a discrepancy, a man cannot withhold what he has not got, and that the whole case for the prosecution was to show that the money had been squandered. If the section had said neglect or refuse to deliver the matter would have been different.

(2.) That if he found the defendants guilty of the offence charged, he was bound as a matter of law to make an order for the refund of the amount referred to in the summons—namely, 379*l.* 4*s.* 3*d.*, and that he could not make an order against both defendants to refund the total sum, because the society would get double if they both paid, and he had no evidence that each had had half or any other proportion.

The question for the opinion of the Court was whether upon the above statement of facts the magistrate came to a correct determination in point of law.

Wilfrid Lewis (*Sir Thomas Inskip A.-G.* with him) for the appellant. The respondents should have been convicted. The magistrate was wrong in holding that, if a person has parted with money or effects which have come into his possession, he cannot be convicted of wilfully withholding the same within the meaning of s. 12 of the Trades Union Act, 1871. If it is once shown that the person charged has obtained possession of the property and has not accounted for it he is liable to conviction under the section, and it matters not whether he has retained the money or has spent it. It would be absurd if a man could escape conviction under s. 12 merely by divesting himself of the money which he has obtained.

[He referred to *Barrett* v. *Markham* (1) and *Reg.* v. *Bennett & Ward.* (2)]

The magistrate was also wrong in holding that he could not make an order against each of the respondents for the repayment of the full amount which was not accounted for. There would be no difficulty in an order that the money

(1) (1872) L. R. 7 C. P. 405.

(2) (1894) 63 L. J. (M. C.) 181.

should be repaid by the respondents jointly (as in the case of a judgment against joint tortfeasors), and payment by one of the respondents would pro tanto release the other.

It is further submitted that "withholding" under s. 12 is a continuing offence. That would explain its inclusion in the section in distinction to "fraudulently misapplying," the object being to provide for a case where proceedings in respect of the misapplication (which very probably would not be discovered until the annual audit) could not be taken within the six months provided by the Summary Jurisdiction Acts.

Borregaard for the respondent Butler. The magistrate was right in holding that a person cannot be convicted of withholding money with which he has parted. "Withhold" in s. 12 of the Trades Union Act, 1871, must be given its ordinary and natural meaning, and that, according to the New English Dictionary, is "to keep in one's possession what belongs to, is due to, or is desired by another." Sect. 12 says: "or, having the same in his possession, wilfully withhold or fraudulently misapply the same." It is therefore necessary for the prosecution to prove, first, that the defendants had possession of the money; and, secondly, that the two defendants wilfully withheld the money, and those two things must synchronize in point of time. Withholding money which ought to be handed over is not a continuing offence. There is no evidence that Butler was ever required to hand over the money, and no evidence that the money was in his possession at the time the offence was alleged to have been committed. If there is a duty to hand over money, the withholding of it may perhaps be a continuing offence. In the present case, however, Butler was under no duty to hand over the money, because he was never required to hand over the money. In order that the offence of withholding should be created it is necessary that a request to hand over the money should have been made. *Barrett* v. *Markham* (1) is merely an authority as to the discretion of justices with regard to issuing a summons.

(1) L. R. 7 C. P. 405.

[LORD HEWART C.J. What is the difference between "wilfully withholding" and "refusing to deliver"? The magistrate appears to have drawn some distinction between the two expressions.]

Cases under s. 12 of the Trade Union Act, 1871, are not usually cases in which the possession was wrongful in the first instance, whereas in *Pullen* v. *Carlton* (1) the possession was wrongful from the beginning.

[AVORY J. I said in that case that the offence of "detaining" was a continuing offence, and that it was not necessary to prove for the purpose of that offence that there had been a demand and a refusal to deliver up the goods.]

There was no evidence that each of the two defendants had one half or any other proportion of the money. There was no evidence that the offence of withholding had been committed by either of the two defendants or by the two jointly. A person cannot be convicted of aiding and abetting in the commission of an offence unless there is some one guilty of the principal offence. The magistrate could not convict each of the two defendants in the alternative. Under s. 11 of Jervis's Act (11 & 12 Vict. c. 43), the complaint must be made and information laid within six months from the time when the matter of such complaint or information arose. In the present case there is no evidence that that requirement has been complied with. It was held in *Vernon* v. *Watson* (2) that where a penalty has been imposed for misapplying the moneys of a friendly society and an order made for repayment of such moneys and the man has been imprisoned for default in paying the penalty and repaying the moneys, such order and the imprisonment which was execution upon it were a bar to an action subsequently brought by the society for the recovery of the same moneys. The magistrate would not know what sentence to impose if he did not know how much each man had received of the money.

The respondent Fitzgibbon in person.

(1) [1918] 2 K. B. 207.

(2) [1891] 2 Q. B. 288.

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Wilfrid Lewis in reply. In *Pullen* v. *Carlton* (1) Darling J. said that " 'detains' means withholding adversely." It was held in *Meyer* v. *Harding* (2) that the offence of not delivering up, after notice to do so, a certain cash-book containing entries of receipts of rates, was a continuing offence, and that therefore the limitation of time in Jervis's Act (11 & 12 Vict. c. 43, s. 11) was not applicable. There was ample evidence that one or other of the defendants had the whole of the money. It was not necessary to show how much each man had, because there was ample evidence that each man was aiding and abetting the other in withholding it. The fact that the men had squandered the money was no defence to a charge of wilfully withholding it.

LORD HEWART C.J. This is a case stated by one of the Metropolitan police magistrates. It arises in the following way. An information was preferred on behalf of the Chief Registrar of Friendly Societies under the Trade Union Act, 1871, against one J. G. Butler and one G. Fitzgibbon for that on March 30, 1931, they did unlawfully withhold moneys of the Army Clothing Department Employees' Union, a trade union registered under the Trade Union Act, 1871—namely, the sum of 379*l.* 4*s.* 3*d.* The magistrate, having heard the information, dismissed it, and the question is whether, in so doing, he was right in point of law.

So far as the facts are concerned, it is found that at all material times Butler was the secretary of the union, except for the period from April to September, 1926, when he was absent through illness, and during that period the defendant Fitzgibbon handled all moneys received from the collectors. Fitzgibbon by resolution dated June 13, 1924, became the treasurer. It is further found as a fact that it was the treasurer's duty to receive money from the collectors of contributions, to render true accounts and to bank all moneys received at least once a month; and again, that until 1926 the moneys collected were handed to the defendant Butler, and thereafter, subject to a certain exception, were handed to the defendant Fitzgibbon. Fitzgibbon, it is said, made payments from time to time to the defendant Butler for petty cash, but neither of the defendants kept or produced any records of those payments. Fitzgibbon kept a treasurer's cash-book until 1927, when he discontinued keeping it, as the accounts were in a state of confusion, and that cash-book was destroyed by the defendant Fitzgibbon. The case goes on to find "all moneys were duly handed over by the collectors and duly recorded in another cash-book, which the secretary, i.e., the defendant, Butler, had kept in his own handwriting since 1924 inclusive, and had not been handled by any persons other than the defendants." The last annual general meeting was held on March 30, 1931, and that date is treated as the date of the offence. The total discrepancy made up in the manner which has been explained to the Court amounts to 379*l.* 4*s.* 3*d.*

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(1) [1918] 2 K. B. 207, 211.

(2) (1867) 32 J. P. 421.

It was in those circumstances that the magistrate dismissed the summons. He gives two reasons for so doing. The first is: "Although there was a discrepancy, a man cannot withhold what he has not got, and that the whole case for the prosecution was to show that the money had been squandered. If the section had said neglect or refuse to deliver the matter would have been different." The words of the section, which is s. 12 of the Trade Union Act, 1871, are: "If any officer, member, or other person being or representing himself to be a member of a trade union registered under this Act, ... obtain possession of any moneys, securities, books, papers, or other effects of such trade union, or, having the same in his possession, wilfully withhold or fraudulently misapply the same," and so on. It seems to me that the term "wilfully withhold" indicates a continuing offence, and that there is really no difference between wilfully withholding and neglecting or refusing to deliver. Reference was made to *Pullen* v. *Carlton* (1), where the word "detain" was considered, and it was held that detaining under the Act of Parliament there referred to was a continuing offence

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and meant adversely withholding. I think, therefore, that the learned magistrate, who evidently devoted great care to this matter, was in error in his first ground.

The second ground is: "That if I found the defendants guilty of the offence charged I was bound as a matter of law to make an order for the refund of the amount referred to in the summons—namely, 379*l.* 4*s.* 3*d.*—and that I could not make an order against both defendants to refund the said total sum, because the society would get double if they both paid, and I had no evidence that each had had half or any other proportion." The evidence was that the two defendants between them have had the whole of the money, and the evidence, as it stands, was that each was aiding and abetting the other in the matter. I think that the case ought to go back to the magistrate and that he ought to have the opportunity of hearing further evidence. In particular the defendants in the case ought to have an opportunity of putting forward their answer, but if the case remains as it now is, then I think that it is open to the magistrate to make an order against each for the sum of 379*l.* 4*s.* 3*d.*

It is said that a difficulty would arise from the making of any such order, because in default of complying with it the magistrate has power to order the person to be imprisoned; the words of the section, however, are that the Court "may order the said person so convicted to be imprisoned." The question, therefore, whether such an order should be made would be a matter for the consideration of the tribunal. At present, as the matter stands, I have no doubt that the case ought to go back to the learned magistrate in order that the case may be further considered, and in order that the defendants, and each of them, may have an opportunity of making their answer.

I think, therefore, that this appeal from the decision of the magistrate dismissing the summons ought to be allowed.

AVORY J. I am of the same opinion. I think that perhaps it is advisable to call attention to the fact that the statement in the case that it was the duty of the treasurer to bank all moneys received at least once a month is admitted to be an error, seeing that by an alteration in the rules, of which the minute was put in evidence before the magistrate, it appears that the treasurer is required to bank all moneys received at least once a week.

There is one other thing that I think it right to add. I observe that the counsel who appeared before the learned magistrate on behalf of the defendant Butler, appears to have submitted, according to the case, "that the summons was bad because it did not allege that the defendant, Butler, had the money alleged to be withheld in his possession." That reads as if the objection was taken that the summons was bad on the face of it for not containing the allegation that the money was in his possession. Counsel who has argued the case before us says that he does not take the point that the summons is bad on the face of it on account of that omission. Therefore, it must be taken to be merely an objection that it was necessary to prove, for the purpose of this case, that the defendant Butler had the money in his possession on March 30, 1931.

I entirely agree with what has been said already by my Lord, that it was not necessary to show that either of the defendants had the money in his possession on March 30, 1931, if there was evidence, as there most certainly was, that the money belonging to the union had been in their possession and was still being withheld. There is no doubt whatever that the withholding of money under these circumstances is a continuing offence. Therefore I agree that the case should go back to the magistrate with the directions which my Lord has enunciated.

MACNAGHTEN J. I am of the same opinion.

Appeal allowed.
Case remitted.

Solicitor for appellant: *Treasury Solicitor.*
Solicitors for respondent Butler: *Marris & Shepherd.*

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Feb. 5, 8, 9, 10;
March 22.

E. B. SAVORY AND COMPANY *v.* LLOYDS BANK, LIMITED.

[1931. S. 1790.]

Banker—Cheque—Crossed Bearer Cheques stolen by Clerk of true Owner—Payment by Clerk into Branch Bank—Direction to credit his Account at another Branch—No sufficient Information sent to latter Branch to enable Inquiries to be made as to Cheques—Negligence—Bills of Exchange Act, 1882 (45 *&* 46 *Vict. c.* 61), *s.* 82.

The plaintiffs, who were members of the London Stock Exchange, had in their employment two clerks, P. and S., who, over a considerable period, stole a number of cheques which were to be paid by the plaintiffs to certain jobbers, and which, as is usual in transactions between members of the Stock Exchange, were made payable to the jobbers or bearer and were crossed. P. had an account at a country branch of the defendants, whose officials knew that he was a stockbroker's clerk, but did not know, nor did they ask, the name of his employers. S.'s wife had an account at another country branch of the defendants, but the officials there did not know, nor did they inquire, who or what her husband was. P. and S. paid the stolen cheques into one of the defendants' City offices (where nothing was known about either or about the drawers or payees of the cheques) to be credited in the one case to P. at the country branch where he had his account, and in the other case to the account of S.'s wife. In each case when paying in the cheques at the City offices, P. and S. filled up a paying-in slip in the name of the payee, stating merely the name of the customer whose account was to be credited and the amount of the cheque. This paying-in slip the City office forwarded to the customer's branch, the cheque itself being sent direct to the Clearing House by the City office, so that the officials at the customer's branch had no opportunity of judging whether the cheque called for inquiry or not. On the frauds being discovered, the plaintiffs sued the defendants for conversion of the cheques.

At the trial evidence was given by the defendants that the system by which cheques could be paid into one of their offices to be credited to a customer's account at another office had been in operation for nearly forty years by them and by other banks without untoward consequences, and they pleaded that they were protected by s. 82 of the Bills of Exchange Act, 1882, as having acted in good faith—this was admitted—and without negligence:—

Held, that the system under which the cheques could be paid into one of the defendants' offices to be credited to a customer's account at another branch, without furnishing the officials at the latter branch with particulars of the cheques and the names of the drawers and payees so as to enable those officials to make inquiry how the cheques came to be paid into the customer's account, was inherently defective; that it could not be said that the defendants had acted without negligence within the meaning of s. 82; and, consequently, that they were liable to the plaintiffs as the true owners of the cheques.

Held, also, per Scrutton L.J., that the defendants were negligent in that their branch managers, in opening the accounts in the name of P. and Mrs. S. respectively, had failed to make inquiry as to the name of P.'s employers and the occupation of S.

Semble, per Lawrence L.J.: Neither P. nor Mrs. S. was a "customer" within the true meaning of s. 82, inasmuch as neither had an account at the City offices into which the cheques were paid.

Decision of Roche J. reversed.

Appeal from a decision of Roche J.

The plaintiffs, a firm of stockbrokers on the London Stock Exchange, sued the defendants for damages for the conversion of a number of cheques which were stolen by two clerks of the plaintiffs, named Perkins and Smith, over a considerable period and paid by them into the private banking accounts of Perkins and the wife of Smith respectively. As is customary in transactions between members of the Stock Exchange the cheques in question were crossed bearer cheques, having been drawn in favour of certain jobbers. Perkins, who had a banking account at the Wallington branch of the defendants, took the cheques stolen by him to one of the City offices of the defendants, whose officials knew nothing of him or of the drawers or payees of the cheques, filled up a paying-in slip in the name of the payees, and requested that the amounts of the cheques should be credited to his account at Wallington. Smith dealt similarly with the cheques stolen by him, but in his case they were to be paid to his wife's account, which was at first kept at Redhill and later at Weybridge. The cheques were in each case credited to the respective accounts of Perkins and Mrs. Smith.

A system had been in operation for many years with the defendants and other banks whereby cheques could be paid into one branch to be credited to a customer's account at another branch. The person was only required to make out a paying-in slip giving the name of the customer, the branch at which he had an account, and the amount of the cheque. The paying-in slip was then forwarded to the branch to be credited. No information accompanied the paying-in slip showing the name of the drawer or payee of the cheque, nor was the cheque itself forwarded to the customer's branch, it being sent direct to the Clearing House by the receiving branch. At the trial evidence was given on behalf of the defendants that the system had worked satisfactorily and without untoward results till the occurrence of the cases in question.

In the case of Perkins it appeared that the bank officials at the Wallington branch knew that he was a stockbroker's clerk, but they did not know nor did they inquire the name of his employers. In the case of Mrs. Smith's account no inquiry had been made by the officials of the branch where she had an account as to the occupation of her husband. Both Perkins and Mrs. Smith had, when opening their accounts, given references which appeared to the managers to be satisfactory.

The defendants issued to the managers of their various branches a book of rules. The rules material to the points raised in the case were the following :—

"29. No new current account should be opened without knowledge of, or full inquiry into, the circumstances and character of the customer. All parties connected with the account should sign the signature book, and, in the case of a firm, information should be obtained as to its constitution (whether a limited partnership or not) and, if accommodation is required, the balance sheet (if possible, prepared by an accountant) should be seen. The reason for removing the account, if it is transferred from another bank, is a point worth noting, and all these particulars should be duly recorded in the private memorandum book."

"36. No cheques or other documents made payable to a firm, company, or any one in the capacity of a principal, should be accepted for credit of the private account of a partner, agent or clerk, or other person closely connected with the principal, or negotiated for such person, without the principal's written authority. . . . ."

The defendants pleaded that Perkins and Mrs. Smith were customers of theirs, and that they (the defendants) in good faith and without negligence received payment of the cheques for their said customers, and if those customers had no title or a defective title to any of the cheques (which was not admitted), or if the plaintiffs at any material time were the true owners of the cheques, s. 82 of the Bills of Exchange Act, 1882, and the Bills of Exchange (Crossed Cheques) Act, 1906, protected the defendants. As to certain of the cheques the defendants also relied on the Statute of Limitations.

Roche J. held that as the system of allowing cheques to be paid into one branch of the defendants to be credited to a customer's account at another branch had worked without difficulty and without any untoward results for so many years, the defendants were not negligent in not having instructed their managers at the receiving branches that details as to the cheques paid in should be passed on to the customer's branch; and accordingly he held that the defendants had acted in good faith and without negligence, and that they were protected by s. 82 of the Bills of Exchange Act, 1882, except as to one cheque which they had dealt with before Mrs. Smith became a customer.

The plaintiffs appealed.

Schiller K.C. and *Philip Vos* for the appellants. A banker who receives a cheque which has been stolen and collects it is prima facie guilty of conversion, and can only escape liability if he can bring himself within the protection of s. 82 of the Bills of Exchange Act, 1882. (1) The question, therefore, is, have the respondents, in dealing as they did with the cheques in question, brought themselves within the protective words of that section? Bankers must act with such care as a reasonable business man would exercise in the conduct of his own affairs, and it is submitted that in this case the respondents failed to exercise proper care for the interests of the appellants, the true owners of the cheques. Firstly, the system by which the respondents allow persons to pay cheques into one branch to be credited to an account at another branch, as it has been in operation, is inherently defective. The officials at the receiving branch may not, and in this case did not, know anything about the drawers or payees of the cheques or about the person paying in the cheques; nor did they make any inquiries; they were merely given the cheques with a paying-in slip on which Perkins or Smith, as the case might be, said that he was the payee because he signed as such, and asked that the amounts should be credited to the customer's branch. Those officials therefore had no means of testing whether the cheques were in order or not. A system possessing this grave defect cannot be described as reasonably careful. Further, the system was defective in that the officials at the receiving branch sent on to the customer's branch no information which would have enabled the officials of the latter branch to tell whether the cheques were in order; the cheques themselves were not forwarded to the customer's branch, nor were the names of the drawers and payees stated. In the absence of that information the instructions contained in Rule 36 of the respondents' book of rules could not be carried out. If details as to the cheques and the names of the drawers and payees had been sent to the customer's branch, the officials of that branch would at once have seen that the cheques were being improperly dealt with. It should have been foreseen that frauds of the kind in fact perpetrated might be committed.

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(1) Bills of Exchange Act, 1882, s. 82: "Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment."

Secondly, the respondents were guilty of negligence in that the officials at the customers' branches, when opening the accounts, failed to make proper inquiries as to Perkins and the husband of Mrs. Smith. Rule 29 of the respondents' book of rules says that: "No new current account should be opened without knowledge of, or full inquiry into, the circumstances and character of the customer." The officials knew that Perkins was a stockbroker's clerk; they did not know nor did they inquire the name of his employers. In the case of Mrs. Smith's account they made no inquiry as to the occupation of her husband. Banks should only accept customers about whom they have full knowledge.

Rayner Goddard K.C. and *James Wylie* for the respondents. In considering whether the respondents were negligent the standard to be applied in judging of their conduct is the standard to be derived from the ordinary practice of bankers: per Lord Dunedin in *Commissioners of Taxation* v. *English, Scottish and Australian Bank* (1), see also per Tindal C.J. in *Chapman* v. *Walton.* (2) It is said that the respondents disregarded the interests of the true owners. That is not so. The cheques were dealt with in the ordinary way and as other bankers would have dealt with them. A system which had been in operation for forty years without any trouble arising, not only in the business of the respondents but also in that of other bankers, cannot be called a defective or dangerous system. True, a flaw has now been discovered, but that fact does not establish that the respondents were negligent previous to that discovery. In *Hart* v. *Lancashire and Yorkshire Ry. Co.* (3), which was an action claiming damages for personal injuries through an accident which it was said would not have occurred if the railway company had made certain alterations in their sidings, the Court took the view that as the sidings in their then condition had been in use for twenty years without any accident happening, it was unreasonable to suppose that the company could or ought to have foreseen the particular accident. So here, it is unreasonable to suppose that the respondents could or ought to have foreseen that the system which had worked satisfactorily for so many years would have been misused in the way it was by Perkins and Smith. The principle laid down in *Hart* v. *Lancashire and Yorkshire Ry. Co.* (3) was reaffirmed in *Great Western Ry. Co.* v. *Davies.* (4) There it was held to be no evidence of negligence on the part of the railway company to continue the use of a particular fastening at a level crossing, there being nothing intrinsically or necessarily dangerous in it, which had been in use for many years without any mischievous consequences. Negligence involves a disregard of knowledge or of that which ought to have been

(1) [1920] A. C. 683, 689.
(2) (1833) 10 Bing. 57, 63.
(3) (1869) 21 L. T. 261.
(4) (1878) 39 L. T. 475.

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known. If there is no knowledge, or if it cannot be imputed to the respondents that they ought to have foreseen the perpetration of the particular fraud—and the last cited cases show that knowledge of that kind cannot be imputed to them—there is no negligence. The system in itself is a reasonable one; it has been of great utility to customers, and it ought not to be stigmatized as a negligent system.

It has been contended that the respondents' managers at the customers' branches ought to have made more searching inquiries than they did as to Perkins and the husband of Mrs. Smith. There was no evidence that when Perkins' account was opened he was in the service of the appellants. Perkins was introduced by a person upon whom the manager was justified in relying. If he had not been introduced the position would have been different. As to Mrs. Smith's account: as it is quite usual for an account to be opened in the name of a married woman, there was no reason why the manager should make any inquiry as to the occupation of her husband. There was nothing to excite suspicion in the opening of the account or in its continuance.

Schiller K.C. in reply. Neither *Hart* v. *Lancashire and Yorkshire Ry. Co.* (1), nor *Great Western Ry. Co.* v. *Davies* (2) touches the present case. The test there laid down falls within the principle stated by Lord Dunedin in *Fardon* v. *Harcourt-Rivington* (3), that if the possibility of danger is only a mere possibility which would never occur to the mind of a reasonable man, there is no negligence in not having taken extraordinary precautions. Here the position is very different. The system is intrinsically defective and dangerous, one which lent itself to fraud by dishonest persons. A person who foresees danger and does nothing cannot be heard to say that he acted with due prudence. With regard to the opening of the accounts, it has been held to be negligence on the part of a bank not to take up references: *Turner* v. *London and Provincial*

(1) 21 L. T. 261.

(2) 39 L. T. 475.

(3) (1932) 48 Times L. R. 215.

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Bank, (1) *Ladbroke* v. *Todd* (2); and the same must apply if proper inquiries as to the proposed customer are not made.

Cur. adv. vult.

March 22. The following judgments were read:

Scrutton L.J. Savory & Co., members of the Stock Exchange, sued Lloyds Bank for damages for conversion of eighty-nine cheques drawn by them for an amount of a little over 6000*l.* Forty-three of these cheques were stolen by one Perkins, and forty-six by D. C. Smith, both clerks of the plaintiff firm, probably acting in concert to defraud their employers. The defendants' part in the transaction was that they collected the amount for which these cheques were drawn from the plaintiffs' bank, the Midland Bank, and paid that amount in, as to 2295*l.* to Perkins' account with Lloyds' Wallington branch, and 3717*l.* to the account of the wife of D. C. Smith at Lloyds Bank, Redhill, and later at Weybridge.

Roche J., stating that his opinion had fluctuated during the course of the case, gave judgment for the plaintiffs in respect of one cheque, on the ground that Mrs. Smith was not their customer when the defendants collected the cheque. He entered judgment for the defendants in respect of the rest of the cheques, on the ground that under s. 82 of the Bills of Exchange Act, 1882, they had satisfied him, their good faith being admitted, that they had dealt with the cheques without negligence.

I also have felt considerable difficulty in making up my mind in the case, but the question to be decided admits in the end of being stated quite shortly.

Before the Crossed Cheques Act, 1876, and the Bills of Exchange Act, 1882, the defendants would have had no answer to the plaintiffs' claim. They dealt with the cheques in a manner inconsistent with the rights of the plaintiffs, the true owners, i.e., they "converted" them, and would be liable for their face value lost by the plaintiffs: *Morison's* case (1); and it would be no defence that they had no reason to believe they were converting them: *Hollins* v. *Fowler.* (2) But s. 82 of the Act of 1882, following s. 12 of the Act of 1876, gave the banker, in the case of crossed cheques, protection if he received payment for a customer "in good faith and without negligence." A question at once arises, as there is no "negligence" without a legal duty, what was the exact duty imposed on the bank, and to whom? Before the Acts, the bank, of course, owed a duty to every owner of property not to convert it, but that duty was absolute, and independent of reasonable care. In my view, s. 82 lessened the duty of the bank by limiting it to an obligation only to use reasonable care in dealing with the cheque, or by providing that if the bank proved that it had used reasonable care in discharging its obligation to the true owner not to convert his property, it was discharged from liability though it had converted that property. It is not material in this case to decide which is the correct expression of the meaning of s. 82. Kennedy J. in *Hannan's Lake View Central* v. *Armstrong & Co.* (3) says (4): "The only question is, Did [the bank] act without negligence? What does 'without negligence' mean? It means, I take it, without want of reasonable care in reference to the interests of the true owner, the principal whose authority the customer purports to have."

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(1) (1903) 24 Journal of Institute of Bankers, 220.
(2) (1914) 30 Times L. R. 433.

Now, reasonable care in the interests of the true owner depends to a considerable extent on the nature of the dangers by which the interests of the true owner are threatened, and experience has shown that one such threat is the risk that a servant of the true owner will misappropriate a cheque made payable to his employer by paying it into his (the servant's) private account. This danger was already recognized in 1920, for the defendant bank produced their book of rules of that date, of which Rule 36 is as follows: "No cheques or

(1) *Morison* v. *London County & Westminster Bank* [1914] 3 K. B. 356.

(2) (1875) L. R. 7 H. L. 757.

(3) (1900) 5 Com. Cas. 188.

(4) 5 Com. Cas. 191.

other documents made payable to a firm, company, or anyone in the capacity of a principal, should be accepted for credit of the private account of a partner, agent, or clerk or other person closely connected with the principal, or negotiated for such person, without the principal's written authority."

This kind of risk was emphasized when in 1924 in *A. L. Underwood, Ld.* v. *Bank of Liverpool and Martins* (1) a bank was made liable for allowing a managing director to pay a cheque made payable to his company into his private account. The present defendants impressed this risk on their managers and cashiers by frequent circulars, which were produced to us in the Court of Appeal, but were not before the judge at the trial. As late as 1930 the bank were telling their managers: "There have been repeated and emphatic warnings to managers and cashiers about the necessity of observing this Rule as closely as possible. Despite those warnings the Directors view with concern the losses which the Bank still suffers from time to time through the non-observance or faulty application of Rule 36. Every member of the staff should be alert in dealing with the following cases." These cases were cases of misappropriation of a cheque payable to the employer. The circular continued: "That which goes into an account calls for as much careful scrutiny as that which goes out, and cashiers should never hesitate to refer to their managers any articles which might put the bank upon enquiry. Again and again the Courts have decided against the banks where they have failed to observe elementary safeguards, and whilst we must always firmly maintain our right to the protection afforded to the collecting banker by s. 82 of the Bills of Exchange Act, we must be continually on our guard to avoid any action which might legally be deemed to be negligent." But a second branch of the risk is where the employer draws cheques in favour of a third party or of "bearer," and the employee steals the cheque and, if necessary, by forgery pays it into his private account. As

(1) [1924] 1 K. B. 775.

by the practice of the Stock Exchange many cheques between members are bearer cheques, cheques on the Stock Exchange are specially liable to this risk. The defendant bank have no printed rule about this, but their witnesses say, and other banking witnesses confirm them, that a similar rule applies to cheques drawn by the employer and paid in by the employee to his private account as that which applies to cheques payable to the employer. Roche J. states the rule thus: "We should not take in without enquiry cheques drawn by a firm in favour of a third party and paid in by a person known to be an employee of the drawing firm." Again: "It is a banking understanding that we do not take in cheques drawn by a firm to be paid in by one of their staff. The cashiers from their ordinary experience would know these ways and refer [the cheque] back to the accountant or the manager." The latter statement omits the essential element that the cheque must be drawn in favour of a third party, not the employee.

This being the threatened risk which the bank ought to guard against, it seems obvious that if any such rules are to be effective, the managers and cashiers should know if their customer is an employee and who is his employer. Unless they know both facts they cannot protect the interests of the true owner if he is an employer.

Now, the bank has a rule No. 29 which was not referred to at the trial below. It begins: "No new current account should be opened without knowledge of or full enquiry into the circumstances and character of the customer." If the bank knows the customer is a clerk, it seems the natural reasonable result that it should ascertain "whose clerk?" It would then know of a relation in which there is the risk of a clerk dealing with his employer's cheque, whether his employer is drawer or payee. But, further, it is obviously desirable that the manager or cashier concerned with the customer's account should look at a cheque paid in, to see who is the drawer and who is the payee, and at the paying-in slip to see who pays the cheque in. He ought not to confine himself to the amount for which the cheque is drawn.

The difficulty in the present case arises from the way in which the banks work a system, in itself unobjectionable and commercially useful. One branch of the bank would, of course, not cash a cheque drawn by a customer who has his account at another branch without further inquiry. The former branch has not the information as to the customer's signature or the state of his account which would enable it safely to do so. But for many years a branch, which I call "the receiving branch," has received a cheque for account of a customer who has an account at another branch, which I call "the customer's branch." The terminology "the receiving branch" and "the recipient branch," used and apparently invented in the Court below, though treated by Roche J. as of long standing, is merely bewildering, and has obviously resulted in considerable confusion in the shorthand notes. The practice by which the receiving branch sends the cheque direct to the Clearing House instead of remitting it to the customer's branch is obviously of commercial convenience as saving delay, and does not involve risk, as the customer's branch will not allow the customer to draw against it till that branch hears of it and hears that it has been cleared. But unless the customer's branch knows the drawer, payee, and person paying in the cheque, there is nothing to put that branch on inquiry, and protection to the true owner is destroyed. In such a case, knowledge is divided, so as to become useless. The receiving branch may know the drawer and payee of the cheque, and who presents it, but has no information as to the status of the employee or the name of his employer; the customer's branch onlv knows the amount of the cheque and to whose account it is to be credited, but not the drawer or payee. But Lloyds, and apparently other banks, carry out the very legitimate system of receiving at one branch a cheque for the credit of the customer at another branch in a way which does distribute the information and defeats the protection against risk. They cause the person paying in at the receiving branch to sign a paying-in slip which contains the name of the customer and the branch at which he banks, the amount of the cheque, and the name of the person paying in, and they send this slip to the customer's branch; they do not tell the customer's branch the drawer or payee of the cheque. The customer's branch has therefore no opportunity of using its knowledge of the customer or his employer. The receiving bank, I gather, would make inquiry if the payee was a company or firm other than the customer, but has no other knowledge that would put it on inquiry. The banks suggest that it would take too much time to pass on the extra information. Pickford J. said in *Crumplin* v. *London Joint Stock Bank* (1): "It was no defence for a bank to say that they were so busy and had such a small staff that they could not make enquiries. If they could not make enquiries when necessary, they must take the consequences." The same remark applies to passing on necessary information to the customer's branch. But I do not understand the bank's difficulties. In one of the branches in question the bank received 4000 cheques a day, of which 80 to 100 were for transmission to other branches, two to two and a-half per cent. of the total cheques. In the case of each of these 100 cheques they do in fact send on the paying-in slip, which they require the payer-in to fill up, to the customer's branch. They have only to alter the form of the paying-in slip so as to require the person paying in the cheque to insert in that slip the name of the drawer and payee, and the necessary information is given to the customer's branch without any additional trouble to the receiving branch. The bank say they perhaps cannot read the drawer's signature, but in the form suggested the payer-in would have to read it. If he could not, it would be very suspicious. The bank relied on a long-established practice of bankers not to give this information. I attach no importance against the bank to the fact that we were told they are now considering whether they should alter the system. Prudent alterations to avoid damage after it has happened are not necessarily evidence of negligence before the damage has occurred, but I agree with Lord Tomlin's remark in *Bank of Montreal* v. *Dominion Gresham*

(1) (1913) 30 Times L. R. 99, 101.

Guarantee and Casualty Co. (1): "Neglect of duty does not cease by repetition to be neglect of duty."

It is not necessary to go in great detail into the facts as to the accounts of Perkins and Mrs. Smith respectively, for the judge finds, and counsel for the bank agree, that if the customer's branch in each case, Perkins and Smith, had had all the information that the receiving branch had to add to its own information, its manager would have been put on inquiry, and the fraud would have been discovered. The division of information prevented the discovery. In Perkins' case the Wallington Bank knew he was a stockbroker's clerk, but did not ask the name of his employer; they relied on a reference from a well known local footballer, and made no further inquiries. They were never told that all the cheques paid in were drawn by Savory & Co. In one case they did receive from Perkins for his account a cheque drawn by Savory & Co. and made payable to "Sly or bearer," but as, not having asked, they did not know that Savory was Perkins' employer, their suspicions were not aroused. The nature of the account, however, seems to me suspicious. Perkins they knew to be a stockbroker's clerk. Into his account there were paid once, twice, or thrice a month, sums considerable for the size of the account, but varying in amount, amounting in a year to over 1000*l.* Nearly all were apparently paid in by a third person, Davis. If the customer's branch had seen the cheques, it would have seen that they were drawn by Savory in favour of Davis or bearer. If the receiving bank had known who was the employer of their customer they would at once have had a case within the rules. They did not know, because the system of the bank divided the information which should have been united in the customer's branch.

Smith's case is different in two respects. In the first place, while Perkins' account was fed partly by genuine cheques, though of smaller amount than the stolen cheques, Mrs. Smith's account was fed practically entirely by stolen cheques. In the second place, while the Smith account was opened in the name of "D. Cowie Smith, wife of David Smith," no inquiry was made as to the occupation of David Smith, or, if he proved to be a clerk, as to his employer. If these inquiries had been made and truthfully answered, and the manager of Mrs. Smith's branch had seen the cheques, he would at once have been put on inquiry. In this case the bank said they need not inquire as to the occupation of the husband. If this is right, accounts in the names of the wives of dishonest clerks will become as popular as they appear to be in the case of fraudulent bankrupts. I have had some doubt on this point, as the bank say, with some force: "Where are we to stop? Accounts may be in the name of sons, daughters, brothers or sisters of clerks." I have come to the conclusion that, considering the danger to be guarded against, husband and wife are usually sufficiently one person to require the bank in opening the account to ascertain the occupation of the husband, and, if he is an employee, the name of his employer. Apart from this, if the customer's branch had seen the cheques they would have known that the account was entirely fed by cheques drawn by a business firm in favour of a third party, and apparently not paid in by the customer or her husband. This odd state of things would, it was agreed, and the judge finds, have put them on inquiry.

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(1) [1930] A. C. 659, 666.

I act on the test suggested by Lord Dunedin in the recent case of *Fardon* v. *Harcourt-Rivington* (1): "The root of this liability is negligence, and what is negligence depends on the facts with which you have to deal. If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions." Here, in my opinion, the danger had been reasonably apparent for some years, and it should have been apparent that the system did not take reasonable precautions against the danger.

(1) 48 Times L. R. 215, 216.

In my opinion, the bank have not discharged the burden of proving that they dealt with these cheques without negligence. Their branch managers have not made sufficient inquiries in opening the two customers' accounts, and the banks receiving the cheques have not passed on sufficient information to the customer's branch, as they easily could have done.

The appeal must be allowed and the judgment below varied by entering judgment for the plaintiffs for 5232*l.* 13*s.* 2*d.* with costs here and below.

LAWRENCE L.J. The question to be determined on this appeal is whether in the circumstances of the present case the respondent bank has brought itself within the protection conferred on collecting bankers by s. 82 of the Bills of Exchange Act, 1882. The answer to this question depends upon whether the evidence adduced at the trial has established that the bank, in collecting the cheques stolen by Perkins and Smith from the plaintiffs, acted without negligence. All the stolen cheques were drawn by the plaintiffs on the Midland Bank in favour of a third party "or bearer," and were crossed generally. Prima facie the bank was guilty of conversion, and it cannot escape liability to the true owner of the cheques unless it can establish affirmatively that it collected them for a customer in good faith (which is not questioned in the present case) and without negligence. Sect. 82 was enacted in relief of bankers, and the statutory duty imposed upon them to act without negligence is no doubt the price of the protection thereby afforded. Whether a banker in any given case has acted without negligence is necessarily a question of fact: "It follows that, being a question of fact, it is really impossible to lay down rules or statements which will determine what is negligence and what is not. Each case must be determined on its own circumstances": per Lord Dunedin in delivering the judgment of the Board in *Commissioners of Taxation* v. *English, Scottish and Australian Bank.* (1)

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(1) [1920] A. C. 683, 689.

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Bankers are no doubt frequently placed in a delicate position in carrying out their statutory duty to the true owners of cheques which are handed to them by their customers for collection. In complying with their contractual obligation to their own customers, and, generally, in conducting their business to the greatest advantage to themselves and their customers they necessarily run the risk of committing a breach of their statutory duty to the true owner of the cheques paid into the accounts of their customers. The respondent bank is fully aware of this risk, and the numerous cases which have been decided in the Courts from time to time have led it to lay down certain rules for the guidance of its managers, both at its head office and at its numerous branch offices. The fact that a breach of these rules has been committed does not necessarily prove that the bank has acted negligently, as the rule which has been broken may have been made from excessive caution, but in most cases it would furnish a strong prima facie ground for holding that the bank had not acted without negligence. As each case has to be determined on its own circumstances, no useful purpose would be served by reviewing the cases which have been cited to us, as in none of them were the facts at all like the facts of the present case.

One of the main rules acted upon by bankers (including the respondent bank) is not, without inquiry, to accept cheques drawn by a company, firm, or principal in favour of a third party tendered for payment into the private account of a customer known to be an employee of the drawer. This rule is admitted by the respondent bank to be so elementary and so well known to all its managers and cashiers as to render its insertion in the bank's printed book of rules superfluous. This book, however, contains another rule which has a close bearing on the elementary rule above referred to, and is one which every careful banker should observe. I refer to Rule 29, which (so far as material) provides that no new account should be opened without knowledge of or full inquiry into the circumstances and character of the customer. Unless bankers act upon this rule, and, in the case of a clerk or employee opening an account, inquire who his employer is, they will, in my opinion, run a serious risk of being held negligent if without inquiry they accept a cheque which happens in fact to be drawn by the employers in favour of a third party and collect that cheque for the private account of the employee. There are other rules which the bank has laid down relating to the precautions to be adopted when cheques are presented for collection on behalf of its customers, but the two rules to which I have referred are those more directly relevant to the present case. It is interesting to notice that the following instructions were given by the respondent bank to its managers by a circular dated June 30, 1930: "That which goes into an account calls for as much careful scrutiny as that which goes out. . . . . Again and again the Courts have decided against the banks where they have failed to observe elementary safeguards, and . . . . we must be continually on our guard to avoid any action which might legally be deemed to be negligent." In view of these explicit instructions it is a matter of some surprise to me that the respondent bank should have adopted and carried on a system under which, as at present operated, no effectual scrutiny of what goes into the accounts of its customers is possible.

According to the evidence given at the trial, any person can bring to the head office or to any branch office of the respondent bank a cheque made payable to an individual with a paying-in slip purporting to be signed by the payee or by any other person, which slip contains a mandate to pay the cheque to the credit of the account of a customer at another branch of the respondent bank, whereupon the receiving office will, without inquiry and without knowing anything about either the customer's account at the other branch, or the drawer of the cheque, or the payee, or the person paying in the cheque, accept and collect the cheque, contenting itself with merely sending to the customer's branch a credit slip and the paying-in slip, neither of which documents contains the name of the drawer or the name of the payee. It is a matter of comment that one of the stolen

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cheques thus presented was collected for Mrs. Smith before she had opened any account with the respondent bank. The procedure thus adopted obviously precludes the manager of the customer's branch from scrutinizing what goes into his customer's account; all that he learns from the credit and paying-in slips is that a cheque for a certain sum of money has been paid into his customer's account and that the account has been credited with that sum accordingly. It is not disputed that if Perkins and Mrs. Smith had brought the stolen cheques to the branches where they kept their drawing accounts, those cheques would not have been accepted without inquiry; it is therefore unnecessary to determine whether the respondent bank acted negligently in opening Perkins' account without inquiring who his employers were, and in opening Mrs. Smith's account without inquiring anything about her husband. I would, however, observe that if it is not the practice to make such inquiries collecting bankers will run the risk of not being able to rely on the protection afforded by s. 82.

Although the only question debated in the present case was whether the respondent bank had acted negligently in receiving and collecting the stolen cheques, it should not be lost sight of that s. 82 only applies where a banker receives payment of a cheque "for a customer." I am by no means satisfied that Perkins and Mrs. Smith were "customers" within the true meaning of that section. They had no account at the receiving offices, and although no doubt the respondent bank with its head office and all its branch offices is a single corporation, and consequently can for its own purposes treat the accounts of a customer at different branches as one entire account, at the same time it is clear from the authorities that for certain purposes branch offices, although agencies of one principal firm, are regarded as distinct trading bodies. Lord Robson, in delivering the judgment of the Board in *Rex* v. *Lovitt* (1), says: "Although branch banks are agencies of one principal firm, it is well settled that for certain special purposes of banking business they may be regarded as distinct trading bodies. Thus, it was held in *Woodland* v. *Fear* (1) that the obligation of a bank to pay the cheques of a customer rested primarily on the branch at which he kept his account, and that the bank in that case had rightfully refused to cash the cheque at another branch. Commenting on that decision, Sir Montague Smith, in delivering the judgment of their Lordships' Board in *Prince* v. *Oriental Bank Corporation* (2), points out that it would be difficult for a bank to carry on its business by means of branches on any other footing, because the officials at one branch do not know the state of a man's account at another branch."

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(1) [1912] A. C. 212, 219.

If the respondent bank was right (as I think it clearly was) in stating in its circular of June 30, 1930, that what goes into an account calls for as much scrutiny as that which goes out, the reason given in the above passage why the various branches of a bank should be treated as distinct trading bodies in the matter of cashing cheques seems to me to afford a prima facie ground for the contention that they ought to be similarly treated in the matter of collecting cheques.

There is authority for the proposition that s. 82 applies only where a cheque is collected for a customer in the proper sense of the word, i.e., a person having or about to have an account at the collecting bank : see, e.g., *Lacave & Co.* v. *Crédit Lyonnais* (3) ; *Great Western Ry. Co.* v. *London and County Banking Co.* (4) ; and *Commissioners of Taxation* v. *English, Scottish and Australian Bank.* (5) In the present case neither Perkins nor Mrs. Smith had any account at the respondent bank's offices which collected the stolen cheques for them ; they were not known at those offices, and those offices did not charge them for the accommodation thus afforded ; in no real sense were they customers of the collecting offices. So far as the substance of the matter is concerned, Perkins and Mrs. Smith might just as well have been customers of some bank other than Lloyds. I refrain, however, from expressing any final opinion on this question, as it was not

(1) (1857) 7 E. & B. 519.
(2) (1878) 3 App. Cas. 325.
(3) [1897] 1 Q. B. 148.
(4) [1901] A. C. 414.
(5) [1920] A. C. 683.

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raised by the plaintiffs, and no argument was addressed to us upon it, and because in my opinion the plaintiffs are entitled to succeed on this appeal, whether Perkins and Mrs. Smith were customers of the respondent bank within the meaning of s. 82 or not. For the purpose of this judgment, therefore, I will assume that they were customers of the respondent bank, but if a similar case should come up for decision hereafter, I desire to guard myself against being taken to have decided this question in favour of the bank on the present occasion.

The system of receiving payment of cheques at the bank's offices other than the customer's branch office is obviously beneficial from the point of view of the customers of the bank, as it ensures a more rapid clearance of their cheques, but as at present operated it seems to me entirely to neglect the statutory duty imposed by s. 82. If the respondent bank desires to continue the system, and at the same time wishes to have the benefit of the protection afforded by s. 82, I am clearly of opinion that it must devise some method of safeguarding the interests of the true owner of any cheques collected under it. What precisely that method should be is a matter for consideration by the respondent bank, and I hesitate to make any suggestions on the subject. One obvious precaution, however, which occurs to me is that the customer's branch should at least be placed in possession of all the information which the receiving office has, and in particular should be told the names of the drawers and payees of the cheques. Without these names the manager at the customer's branch has no opportunity of judging whether the cheques collected by the receiving office were cheques calling for inquiry or not. It is no excuse for blindly collecting cheques in the manner hitherto adopted to say that it would be impossible from a practical point of view to work the system if the information I have suggested had to be given to the customer's branch. If, indeed, that be the fact, which I beg leave to doubt, the respondent bank must either abandon the system or else run the risk of not being able to rely upon the protection afforded by s. 82.

Had the bank's dealings with the stolen cheques been isolated transactions, and not in accordance with a long-established system, or had the system under discussion been only recently instituted, I should have had no hesitation in holding that the bank had failed to establish that it had acted without negligence in the present case. The real difficulty lies in the fact that the system has been in operation on the lines adopted in the present case for upwards of forty years, not only by the respondent bank but by other banks (such as the National Provincial Bank and Barclays Bank) without any recorded case in which it had been taken advantage of by fraudulently minded persons. This fact, which was the deciding factor in the Court below, raises a question of considerable difficulty, upon which I confess my mind has fluctuated during the course of the case. Mr. Rayner Goddard contended with much force that the bank could not properly be held negligent in acting in accordance with a system which, however defective it has proved to be in the present case, has prevailed amongst bankers for such a long time without untoward results. He submitted that to bring the bank within the protection of s. 82 it was not necessary to do more than prove that it had acted according to the ordinary practice of bankers, and that, whatever step might have to be taken in the future to guard against a repetition of similar frauds, it would not be right to convict the bank of negligence for having in good faith acted in accordance with such a long-established practice. In support of his argument Mr. Rayner Goddard cited *Chapman* v. *Walton* (1) and *Commissioners of Taxation* v. *English, Scottish and Australian Bank.* (2) In the former case, which dealt with the question whether an insurance broker had in the course of his employment acted with reasonable and proper care, Tindal C.J. said that the question depended upon the inquiry " whether other persons exercising the same profession or calling, and being men of experience and skill therein, would or would not have come to the same conclusion as the defendant. For the defendant did not contract that

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(1) 10 Bing. 57.

(2) [1920] A. C. 683.

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he would bring to the performance of his duty, on this occasion, an extraordinary degree of skill, but only a reasonable and ordinary proportion of it; and it appears to us, that it is not only an unobjectionable mode, but the most satisfactory mode of determining this question, to show by evidence whether a majority of skilful and experienced brokers would have come to the same conclusion." In the latter case Lord Dunedin, in delivering the judgment of the Board, after stating that the standard of care to be taken by bankers which had been laid down by the Chief Justice in the High Court of Australia as not being less than a man invited to purchase or cash a cheque for himself might reasonably be expected to take, was inapposite, said (1): "If, therefore, a standard is sought, it must be the standard to be derived from the ordinary practice of bankers, not individuals." In my judgment, neither of the pronouncements so relied upon was intended to cover such a case as the present, where bankers, solely for the convenience of their customers, have adopted a system with an inherent and obvious defect which no reasonably careful banker could fail to observe. The respondent bank did not adduce any evidence tending to justify the system from the point of view of the true owner of the cheques collected under it; it could not be, and was not, seriously denied that according to the system the elementary rule of scrutinizing cheques paid into an account of a customer was rendered wholly nugatory and that the interests of the true owner of the cheques was entirely disregarded; all that was said in justification of the system was that it was highly beneficial to customers and had been practised for a long time without having been abused.

In my opinion, bankers who have disregarded their statutory duty towards the true owner of the cheques collected by them for a customer cannot, when challenged by the true owner, successfully plead that they have acted without negligence in his case because for a long time they and other bankers have acted in disregard of their statutory duty in

(1) [1920] A. C. 689.

other cases. To allow such a plea would be to hold that if a negligent act were repeated sufficiently often it would cease to be negligent and become careful. That the system has not led to trouble long ago is no doubt due to the fact that the method which bankers adopt in working it is purely a matter of internal and private administration, and that it would not readily occur to any one that bankers would neglect such an elementary precaution as sending to the customer's branch full particulars of the cheques accepted at the receiving office. By some means Perkins and Smith seem to have found out that the respondent bank was neglecting this elementary precaution and to have taken advantage of that neglect.

In these circumstances I have, after consideration and not without hesitation, come to the conclusion that, notwithstanding the length of time during which the system has been in operation, the respondent bank has failed to establish to the satisfaction of the Court that it has acted without negligence in the present case.

For the reasons stated, I agree that this appeal should be allowed.

Greer L.J. The appellants, Messrs. E. B. Savory & Co., ask this Court to reverse the finding of Roche J. in favour of the defendants, Lloyds Bank, Limited, in an action in which the appellants at the hearing of the action claimed damages for the conversion of a number of cheques which the bank collected, and the proceeds of which they placed to the credit, in the case of sixteen cheques, of the plaintiffs' clerk, William Henry Perkins, and in the case of forty-six cheques to the credit of Mrs. D. C. Smith, the wife of another of their clerks, David Cowie Smith. The defendants admitted, as they were bound to admit, having regard to the numerous reported decisions relating to the conversion of cheques, that they were liable for damages for conversion unless they were able to bring themselves within the protection of s. 82 of the Bills of Exchange Act, 1882. The sole question in this appeal is whether the learned judge was right in finding that the defendants had established their right to rely on the provisions of s. 82.

The relevant facts can be quite shortly stated. There is a rule of the Stock Exchange that members making out cheques for other members must make them payable to the member in question or bearer, so that they can rapidly be passed from hand to hand. It is probably necessary to do this having regard to the numerous and complicated transactions that arise for settlement on the Stock Exchange, and no doubt it is a convenient rule for the purposes of Stock Exchange business. Perkins had a drawing account at the branch of Lloyds Bank at Wallington where he lived. In March, 1924, so far as appears by the documents before the Court, he began to steal cheques which had been drawn by his employers on the Midland Bank for the purposes of their business. So far as the sixteen cheques in question are concerned, they were all made out to Mr. W. P. Davis or bearer, and crossed. Mr. Davis was a Stock Exchange jobber. The claim in the action as pleaded included a number of cheques with which we are not now concerned, as the claim on these cheques was barred by the Statute of Limitations. The appeal is only concerned with cheques on which the claim is not barred by the statute, but, of course, in considering whether the defendants made out their defence it may be necessary to consider what had happened with regard to cheques earlier than those with which this appeal is concerned. Perkins' modus operandi was to take the stolen cheques to the Threadneedle Street or Monument branch of the defendants' bank in the City of London, to fill in a slip in the name of the payee, which in every one of the cases with which this appeal is concerned was W. P. Davis, and tell the bank to credit his account at Wallington. The clerk who received the cheque in London could see that the cheque was drawn by Savory & Co. in favour of Mr. W. P. Davis, and was not being paid in to the credit of Mr. Davis, but was being paid in to the credit of some other person at a suburban branch. It might, so far as they knew, have been the result of a transfer by Mr. Davis to some other person, and an authority by Davis or such other person to whoever paid in the cheque to ask that it should be credited to Perkins at Wallington. The paying-in slip in all these instances purports to be signed by W. P. Davis, but it does not state who the drawer of the cheque is, or who the payee of the cheque is, and the clerk in the London branch did not, and could not, know whether the person who presented the cheque was authorized to do so on behalf of Mr. Davis or the true owner, nor did he or could he know who Perkins was, or what right he had to have the cheque cashed and the proceeds paid to his credit. On receipt of the cheques the receiving branch sent them on to the Clearing House, where they were cleared, and the Wallington branch was duly credited with the amount. The cheques never went to the Wallington branch, nor was that branch ever informed of the name of the drawer or the name of the payee. The same system was adopted by Smith in reference to the cheques that he stole, with the exception that the cheques were paid in to the Head Office, and the bank was asked to credit the amount of the cheques to his wife's account which was for a short time at Redhill, and afterwards at Weybridge. When Perkins opened his account at Wallington he was introduced to the bank manager by a gentleman named Sitch, who was a customer of the bank, and the manager either knew or was informed that Perkins was a stockbroker's clerk, but he did not ask for the name of his employer. It was, however, admitted by Mr. Goddard that if the cheques had been handed in at Wallington to be credited to Perkins' account, the fraud would have been discovered before any of the sixteen cheques in question had been drawn. As regards Mrs. Smith's account, she had been introduced to the bank at Redhill by a lady customer whose tenant she was, and this was considered sufficient. The introduction was passed on to Weybridge branch, when the account was transferred there. I propose to deal separately with the appeal so far as it is concerned with the Perkins cheques, and so far as it is concerned with the Smith cheques.

Sect. 82 of the Bills of Exchange Act, 1882, reads as follows: "Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment." Apart from the section, it is quite beyond question that a banker receiving payment for a customer of a cheque, whether crossed or not crossed, would be liable for conversion of the cheque notwithstanding that he received it in good faith and had exercised the utmost care in making inquiries before doing so. In applying the section it is necessary to consider it separately with regard to each cheque which is alleged to have been converted by the collecting bank: see *Morison* v. *London County & Westminster Bank.* (1) It is, I think, also true to say that a banker who has not exercised reasonable care cannot claim the benefit of the section even though it may seem probable that the exercise of care would not have enabled him to discover the defective title of his customer. The protection is given to careful bankers, and any banker who does not exercise reasonable care is outside the section altogether, even though he may be able to say: "If I had exercised care the fraud would not have been discovered." It is also worthy of notice that negligence with which the law is concerned is always want of care towards some person to whom the law gives the right to have care exercised towards him. Negligence means neglect of a duty to take care not to injure somebody. In s. 82 the negligence referred to must mean a failure to take reasonable care to protect the interests of the person who may happen to be the true owner of a cheque presented for collection by somebody else. There are certain well known dangers to which in the usual course of business the true owner of a cheque is liable to be exposed. One of the most notorious of these dangers is of a kind that has frequently been brought to the attention of the Court and has become known to bankers through the publication of

(1) [1914] 3 K. B. 356.

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E. B. SAVORY & Co. v. LLOYDS BANK, LD.

Greer L.J.

the reports which the Bankers' Institute on behalf of all bankers closely scrutinize; this is, the risk that the drawer of a cheque, or the payee of a cheque, runs of having his cheques stolen by his agents or clerks and used for their own purposes. This is a danger to which Lloyds Bank were certainly alive. This is shown by the Rules they have adopted for the purpose of enabling their clerks to exercise care. Rule 36, which has been in force for a long time, reads as follows: "No cheques or other documents made payable to a firm, company, or anyone in the capacity of a principal, should be accepted for credit of the private account of a partner, agent or clerk, or other person closely connected with the principal, or negotiated for such person, without the principal's written authority. In cases where it has for long been customary for solicitors, insurance brokers, auctioneers, etc., to endorse and pay into their private or business accounts cheques which are payable to insurance companies for which they individually act as agents, it may not be easy to insist upon the discontinuance of the practice, especially when the customers concerned are of undoubted reputation, and in these cases it may be that a certain amount of risk must be taken. Managers must, however, exercise careful discrimination in this respect, and only allow exceptions from this rule in cases in which full reliance can be placed on the customer. Similarly, endorsements by agents on behalf of insurance companies should not be confirmed by the bank unless the manager is fully satisfied with the standing of the customer who signs as agent. Exceptions to this rule will not extend to official representatives of insurance companies in their actual employment, such as resident secretaries or district inspectors, who may keep private accounts with the Bank. In such cases no cheques payable to the companies which such officials represent must be negotiated for those officials in their private capacities or allowed to be paid into their private accounts." It was proved by the witnesses called for the defence that banks recognize the need for similar caution in the case of cheques paid in to the credit of a clerk or agent of the drawer.

The need for caution in this case is said to be recognized by bank clerks intuitively, and is so well known that it does not appear to have been deemed necessary to have an express written rule on the subject. These rules are very difficult to carry out if banks do not ask customers who are to their knowledge clerks, agents, or servants of a company, firm, or a principal, what is the name of their employer. I think the name of the employer where they know that a customer opening an account is an employee is one of the circumstances as to which managers or clerks ought to inquire in carrying out Rule 29 of the Rules of Lloyds Bank relating to the opening of accounts. The system which the respondent bank and other banks are stated to have been carrying on for forty years or more, of allowing payments to be made into one branch for the credit of a customer at another branch without sending on either the cheques or the names of the drawers and payees to the branch where the cheques are to be credited, seems to me to be a system which prevents the exercise of any care whatever to protect the true owner by refusing without inquiry to accept cheques drawn by an employer to a named person, or bearer, and paid in to the private account of a clerk or servant. It is capable quite easily of being made a system which would be consistent with the exercise of due care in the interests of the true owner. The paying-in slip is always sent on to the branch where the amount of the cheque is to be credited. The banks could quite easily say that they would not accept payments of cheques tendered to be credited to a third person without a statement on the face of the slip of the name of the drawer and of the payee of the cheques. It is said that they would then have to check the slip, and in many instances they might not be able to read the names. If they did their best, nobody would say that they were negligent; but the fact that they could not always protect the interests of the true owner in the way mentioned would not enable them to say that they exercised due care in cases where it was quite easy, as in all the cheques in question in this action, to ascertain the name of the drawer, which was in print, and the name of the payee, which was in every case legibly written. It seems to me that the defendant bank were negligent because they did not obtain information on the slip of the names of the drawer and the payee of these cheques. It is admitted that if this had been done the branch bank would with reference to every one of the Perkins cheques have been put on inquiry, and the plaintiffs would not have lost their money. It is to be recollected that before the first cheque with which this appeal is concerned, that is to say, the cheque of January 12, 1926, was paid, there had been a considerable number of cheques drawn by the plaintiffs in favour of Davis paid in to the credit of Perkins. Unfortunately, the bank in the country, by reason of the system adopted, might quite readily have thought that the cheques were in favour of Perkins, drawn by Davis for some legitimate reason; but if the manager at Wallington had known that those cheques were cheques drawn by the plaintiffs in favour of Davis, he would admittedly have made inquiries which would have resulted in the discovery of the fraud. It could not be suggested in this case, as it was in *Morison's* case (1), that after a considerable number of these cheques had gone through there was no negligence on the part of the bank with regard to the later cheques. In the present case the negligence was continuous and was repeated every time the London branch received one of the cheques, and it was the result of a system which prevented the bank from knowing when each cheque came forward the circumstances which called for inquiry. In my judgment the learned judge was wrong in holding that the bank is entitled to the protection of s. 82 with regard to the Perkins cheques.

I take the same view with regard to the Smith cheques. I think that if the country branches had been told that the drawers of the cheques were Savory & Co., and the payee of the cheques was not Mrs. Smith or Mr. Smith, but was a gentleman named Gibbes, they would, if they had exercised due care, have made inquiries which in this case also would have resulted in the discovery of the fraud. It would have

(1) [1914] 3 K. B. 356.

struck any careful banker, at any rate after a few of these cheques had been sent in, as rather odd that Mr. F. H. Gibbes, the named payee, was handing over cheques made out to F. H. Gibbes or bearer to the bank for the credit of Mrs. Smith. It may well be that if the information had been sent, the fraud as to a few of the earlier cheques would not have been discovered, but I think that is irrelevant if, as I have already said, the system is one a careful banker would not have allowed to operate. It is said that it must be a reasonably careful system because all bankers have been acting on it. I am not sure that it is right to say that it is established that all bankers have been doing it for the last forty years. It may well be that some bankers do send on the information to the customer's branch. It is indeed established that a system of paying cheques in at one branch for the credit of a customer at another branch had been in operation for a long time, probably forty years, but I do not regard it as established that the practice in every instance of every bank with regard to what information is sent on to the customer's branch is identical with the practice of Lloyds Bank and Barclays Bank; and, even if it were, I do not think that that is conclusive that at the present day the practice is consistent with the exercise of due care in looking after the interests of the true owner.

No separate point was made by Mr. Goddard on behalf of the respondents with regard to the earlier Smith cheques.

I agree that this appeal should be allowed, with costs, and judgment entered for the plaintiffs for the value of the cheques and costs.

Appeal allowed.

Solicitors for appellants: *William Charles Crocker.*
Solicitors for respondents: *Gregory, Rowcliffe & Co.*

J. S. H.

BRIGHT *v.* ASHFOLD.

1932
April 8.

Motor Car—Insurance against Third-Party Risks—Condition in Policy limiting Liability—Breach by Assured of Condition—Validity of Condition—Carrying a Passenger without a Side-car being attached to Motor Bicycle—Offence of using a Motor Vehicle on a Road without a Policy of Insurance against Third-Party Risks being in force in relation to the User of that Vehicle by that Person—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *ss.* 35, 36, 38.

The Road Traffic Act, 1930, provided by s. 38 that "Any condition in a policy . . . . issued or given for the purposes of this Part of this Act [Provision against third-party risks], providing that no liability shall arise under the policy . . . . in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy . . . . shall be of no effect. . . . ."

A policy of insurance insuring the respondent against third-party risks contained a condition that "the corporation shall not be liable for any accident loss or damage caused or sustained while any motor cycle in respect of which indemnity is granted under this policy is carrying a passenger unless a sidecar is attached." The respondent, who on a certain date drove a motor cycle on a road with another person sitting behind him as a passenger on the pillion without a side-car being attached to the motor cycle, was charged with the offence of using a motor vehicle on a road without there being in force in relation to the user of the vehicle such a policy of insurance in respect of third-party risks as complied with the requirements of Part II. of the Road Traffic Act, 1930. The justices dismissed the information on the ground that the condition in the policy was of no effect by reason of s. 38 of the Road Traffic Act, 1930, and that therefore the policy of insurance was in force on that occasion. On appeal to the Divisional Court:—

Held, that s. 38 applied only to a condition in a policy "providing that no liability shall arise under the policy . . . . in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy," whereas in the present case the condition circumscribed the operation of the policy from the beginning. Therefore, there was no policy in force where a passenger was being carried otherwise than in a side-car.

CASE stated by justices for the county of Surrey sitting at Epsom.

At the Epsom police court an information was preferred by the appellant, William Ernest Bright, under s. 35, sub-s. 1, of the Road Traffic Act, 1930 (1), against the respondent, Harold

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(1) Road Traffic Act, 1930:—

"PART II.

Provision against third-party risks arising out of the use of motor vehicles."

Sect. 35, sub-s. 1: "Subject to the provisions of this Part of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor

Leslie Golds Ashfold, for having on April 4, 1931, at Cheam Road, Cuddington, in the county of Surrey, used a motor vehicle on a road without there being in force in relation to the user of the vehicle such a policy of insurance or such a security in respect of third-party risks as complied with the requirements of the said Act. The information was heard by the justices on June 22, 1931, and having heard evidence and argument they dismissed the information.

Upon the hearing of the information the following facts were proved or admitted.

i. On April 4, 1931, at Cheam Road, Cuddington, the respondent was driving a Triumph two-wheeled motor cycle with another person sitting behind him as a passenger on the pillion of the motor cycle. No side-car was attached to the motor cycle.

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vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third-party risks as complies with the requirements of this Part of this Act."

Sect. 36, sub-s. 1: "In order to comply with the requirements of this Part of this Act, a policy of insurance must be a policy which—

(a) is issued by a person who is an authorised insurer within the meaning of this Part of this Act; and

(b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle on a road. . . ."

Sub-s. 5: "A policy shall be of no effect for the purposes of this Part of this Act unless and until there is delivered by the insurer to the person by whom the policy is effected a certificate (in this Part of this Act referred to as a 'certificate of insurance') in the prescribed form and containing such particulars of any conditions subject to which the policy is issued and of any other matters as may be prescribed, and different forms and different particulars may be prescribed in relation to different cases or circumstances."

Sect. 38: "Any condition in a policy or security issued or given for the purposes of this Part of this Act, providing that no liability shall arise under the policy or security or that any liability so arising shall cease, in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy or security, shall be of no effect in connection with such claims as are mentioned in para. (b) of sub-s. 1 of s. 36. . . ."

ii. The motor cycle was on the said date the property of the City Engineering Motor Company and was being driven by the respondent with the consent of the owners.

iii. On the said date there was in force a policy of insurance which indemnified the respondent against third-party risks while using another motor cycle, and the policy also indemnified the respondent against third-party risks while driving a motor cycle not belonging to him.

iv. One of the terms of the policy was as follows :—

"GENERAL EXCEPTIONS.

"Provided always and it is hereby expressly agreed that the Corporation shall not be liable for any accident loss or damage caused or sustained while any motor cycle in respect of which indemnity is granted under this policy is

"(A) Carrying a passenger unless a side-car is attached."

v. The authorized insurer issuing the before-mentioned policy had issued to the respondent a certificate of insurance, and the said certificate of insurance contained a certificate to the effect that the policy to which the certificate of insurance related was issued in accordance with the provisions of Part II. of the Road Traffic Act, 1930.

vi. The certificate also contained the following statement :—

"This policy does not cover: (1.) . . . .; (2.) Use whilst carrying a passenger unless a side-car is attached to the motor cycle."

vii. Apart from the said policy, there was in force on the said date no other policy of insurance or security in respect of third-party risks in relation to the user of the motor cycle by the respondent.

For the appellant it was contended :—

(*a*) that the exception or condition mentioned in para. iv. hereof operated to prevent the policy covering third-party risks while the motor cycle was carrying a passenger unless a side-car was attached ;

(*b*) that there was therefore no policy of insurance or security against third-party risks in force in relation to the user by the respondent of the motor cycle at the said time and place ;

(*c*) that s. 38 of the Road Traffic Act, 1930, had no application to the case;

(*d*) that there was no evidence before the justices to justify them in dismissing the information.

For the respondent it was contended:—

(*a*) that the exception or condition mentioned in para. iv. hereof, by virtue of s. 38 of the Road Traffic Act, 1930, and more particularly of the words, "that no liability shall arise under the policy" occurring therein, was of no effect in connection with such claims as were mentioned in para. (*b*) of sub-s. 1 of s. 36 of the said Act;

(*b*) that by reason of the ineffectiveness of the said exception or condition there was therefore in force a policy of insurance in relation to the user by the respondent of the motor cycle at the said time and place in accordance with the requirements of the Act;

(*c*) that there was no evidence before the justices to justify them in convicting the respondent on the said information.

The justices, after consideration of the evidence and arguments adduced before them, accepted the contentions advanced on behalf of the respondent, and dismissed the information. The question for the decision of the High Court was whether the said determination was correct in law.

G. D. Roberts for the appellant. The justices have decided in this case that the condition in the policy, providing that the insurers should not be liable for any accident, loss, or damage caused or sustained while any motor cycle in respect of which indemnity was granted under the policy was carrying a passenger unless a side-car was attached, was of no effect by reason of s. 38 of the Road Traffic Act, 1930. But that section has no application in the present case; it only renders void and of no effect a condition in a policy providing that no liability shall arise under the policy or that any liability so arising shall cease in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy. That section was inserted in the Act to prevent the person injured from having his remedy taken away through the person insured not doing something after the accident. The condition in the policy in the present case prevented any liability attaching under the policy as soon as the insured person commenced to carry his passenger on the pillion without a side-car being attached. The argument put forward on behalf of the respondent is that any condition in a policy is rendered void by s. 38 whether it relates to something being done after the happening of the event or otherwise. If, however, s. 38 has that wide meaning, it would not be necessary to insert in the section the words "after the happening of the event," and further, if all conditions are made void and of no effect by s. 38, there was no necessity to refer in s. 36, sub-s. 5, to "any conditions subject to which the policy is issued." If the decision of the justices is correct a motor driver will be able to disregard any condition in the policy by which he is insured and still be regarded as being insured within the meaning of s. 35. It is clear from s. 36, sub-s. 5, that a policy of insurance may contain conditions.

Garth Moore (*Gerald Dodson* with him) for the respondent. Part II. of the Road Traffic Act, 1930, which is headed "Provision against third-party risks arising out of the use of motor vehicles," was intended, as the title to the Act shows, "to make provision for the protection of third parties against risks arising out of the use of motor vehicles." If it is open to the "authorised insurers" to issue a policy containing conditions limiting the effect of the policy, it will be contrary to the policy of the Act, which is intended to be for the protection of third parties. The policy was issued in order to comply with the requirements of the Road Traffic Act, 1930, and purported to cover the assured against third-party risks and, but for this condition, it would have been in force even when a passenger was being carried on a pillion of the motor bicycle without a side-car being attached. That condition was contrary to the policy of the Act, and ought not to be upheld. Sect. 38 of the Act is framed in ambiguous terms, and may be read by a transposition of the commas so as to apply to the present case. If it is read in the sense contended for on behalf of the appellant, the protection of third parties will be taken away.

LORD HEWART C.J. This case, I think, is really too clear for argument. The policy referred to did not cover use whilst carrying a passenger unless a side-car was attached to the motor cycle. In those circumstances, which were the circumstances in the present case, there was no policy of insurance in force in respect of third-party risks.

Reliance is placed by the respondent upon s. 38 of the Road Traffic Act, 1930, but I think it is quite clear that that section has no relation to a condition such as is contained in this policy. Sect. 38 provides that "Any condition in a policy . . . . providing that no liability shall arise under the policy . . . . or that any liability so arising shall cease, in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy . . . ., shall be of no effect." This was a condition which circumscribed the operation of the policy from the beginning. There was, therefore, no policy of insurance against third-party risks at all in force in relation to the use of the motor cycle by the respondent, where a passenger was being carried otherwise than in a side-car. I think it is quite clear that the justices ought to have convicted, and I think this appeal ought to succeed.

AVORY J. I agree and have nothing to add.

HAWKE J. I agree.

Appeal allowed.

Solicitors for appellant: *Wontner & Sons.*
Solicitors for respondent: *Wilkinson, Howlett & Moorhouse.*

R. F. S.

ATTORNEY-GENERAL *v.* ADAMSON.

C. A.
1932
Jan. 21, 22.

Revenue—Estate Duty—Succession Duty—Settlement—Settlement of Funds on Children of Settlor contingently on their surviving Him—Reservation by Settlor of Power to appoint Capital and Accumulations of Income amongst Children—Non-exercise of Power—" Property passing on death" —Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 1; *s.* 2, *sub-s.* 1 (*d*)—*Succession Duty Act,* 1853 (16 *&* 17 *Vict. c.* 51), *s.* 2.

By a settlement dated March 24, 1924, the settlor directed the trustees thereof to hold the capital of the trust funds upon trust for all or such of his children then living or thereafter to be born as he should appoint, and that during his life the income pending any such appointments should be accumulated and added to the capital. On his death the capital went as to two-fifths to his son and as to three-fifths equally between his three daughters if they survived him. The trust on the settlor's death in favour of the son was not expressed to be contingent, but there was a proviso that if the son died before the settlor his two-fifths should go over to the daughters, again only in the event of their surviving the settlor. The son and daughters survived the settlor, who had no more children after the date of the settlement. On the question whether, under the trusts of that settlement, on the death of the settlor on March 11, 1928, without having exercised the power of appointment, the trust property passed on his death to the four children within the meaning of s. 1 of the Finance Act, 1894, and thus became liable to estate duty, and also devolved on the death so as to create a succession under s. 2 of the Succession Duty Act, 1853, and was liable to succession duty:—

Held, (1.) that, before the death of the settlor, the beneficial interest of the children in the trust property was indefinable, since in certain events they might never have become entitled, and the settlor had reserved full control both of capital and income until his death; but, on his death, the son became indefeasibly entitled to two-fifths and each of the three daughters became beneficially and indefeasibly entitled to one-fifth; and accordingly the capital of the trust funds passed on the death as also the accumulations of income.

(2.) That the capital of the trust funds was also liable to succession duty on the death of the settlor, and that no distinction could be made between capital and accumulations of income which were the fruit borne by the corpus of the settled funds.

Attorney-General v. *Gell* (1865) 3 H. & C. 615 approved and applied.

Decision of Rowlatt J. affirmed.

Appeal from a decision of Rowlatt J. on an information filed by the Attorney-General on behalf of the Crown.

1. The object of the information was to recover the estate duty and succession duty payable upon the death of John

Weston Adamson the elder in respect of the settled funds and accumulations subject at the date of such death to the indenture next below mentioned.

The facts as set out in the information were as follows:—

2. By an indenture dated March 24, 1924, and made between the said John Weston Adamson the elder (hereinafter called "the settlor") of the one part and the settlor, the defendant, John Weston Adamson the younger, and the defendant, Joseph William Cottee (in the said indenture called "the new trustees"), of the other part, after reciting that the stocks, shares, securities and cash described in the schedule thereto, and therein called "the settled funds," were and had been for a number of years past held by the settlor as a trustee for the benefit of the settlor's children, but no deed declaring the trusts in respect thereof had been executed, the settlor appointed the new trustees to be trustees for the purposes of the trusts aforesaid, and declared the said trusts to be as follows: the new trustees should pay and apply the capital of the settled funds unto all or any of the children of the settlor as the settlor might direct; in default of such direction and so far as such direction should not extend the new trustees should hold such capital upon trust to pay or apply the income thereof for the benefit of all or any of the children of the settlor as the settlor might direct, and subject thereto to hold the said income as an accumulation to capital; and after the death of the settlor the new trustees should stand possessed of the capital and income of the settled funds so far as not so paid or applied in trust for all or any of the children of the settlor living at his death as the settlor should by deed or will appoint, and in default of appointment in trust as to two-fifths thereof for the said John Weston Adamson the younger, and as to the remaining three-fifths for equal division among all the other children of the settlor living at his death; with a gift over, in the event of the said John Weston Adamson the younger dying without obtaining a vested interest in the said two-fifths, of such two-fifths to the children of the settlor entitled to the remaining three-fifths, and a further

gift over, in the event of the failure of all the said trusts, to the statutory next of kin of the settlor.

3. It was by the said indenture further provided that no child of the testator should take any share in the unappointed part of the capital of the settled funds without bringing into hotchpot any sums already appointed or thereafter to be appointed to him, or her, including three sums of 9473*l.* 2*s.*, 10,000*l.* and 10,000*l.* applied by the settlor for the benefit of the said John Weston Adamson the younger and the settlor's daughters Mary Frances Cail and Clarice Muriel Weston Goodson respectively.

4. The settlor during his lifetime, in exercise of the power of appointment conferred upon him by the said indenture, appointed a capital sum of 518*l.* 11*s.* 1*d.* to the said John Weston Adamson the younger, and further appointed out of income sums amounting in all to 825*l.* and 736*l.* 1*s.* 3*d.* to the said John Weston Adamson the younger and the settlor's daughter, Audrey W. Adamson, respectively. The remaining income arising from the settled funds during the lifetime of the settlor was accumulated to capital under the provision in that behalf contained in the said indenture.

5. The settlor died on March 11, 1928, without having exercised, save as above mentioned, the power of appointment conferred upon him by the said indenture.

6. The settlor left him surviving four children and no more—namely, the above mentioned John Weston Adamson the younger, Mary Frances Cail, Clarice Muriel Weston Goodson and Audrey W. Adamson.

7. Under the provisions in default of appointment contained in the said indenture, the four children of the settlor became entitled at his death to the capital of the settled funds and accumulations in the following proportions—namely, John Weston Adamson the younger, two-fifths; Mary Frances Cail, one-fifth; Clarice Muriel Weston Goodson, one-fifth; and Audrey W. Adamson, one-fifth; subject to their bringing into hotchpot the sums respectively applied for their benefit or appointed to them by the settlor during his lifetime as above mentioned.

8. The settled funds and accumulations consisted at the date of the settlor's death of property of considerable value, the particulars of the present value of which were unknown to the Commissioners of Inland Revenue.

The information, after setting out the facts as above, alleged as follows:—

9. In the circumstances the settled funds and accumulations were property which passed on the settlor's death within the meaning of s. 1 of the Finance Act, 1894, or, alternatively, the interests of the children of the settlor in the settled funds and accumulations which arose at the said date under the provisions of the above mentioned indenture were interests provided by the settlor within the meaning of s. 2, sub-s. 1 (*d*), of the Finance Act, 1894, and in either case estate duty at the appropriate rate became payable in respect of the whole of the settled funds and accumulations upon the death of the settlor.

10. The aggregate value of the estate which passed on the death of the settlor within the meaning of the Finance Act, 1894 (including the settled funds and accumulations as at the date of such death), was at present unknown, but was believed to have exceeded 250,000*l*.

11. The disposition of the settled funds and accumulations under the above mentioned indenture conferred upon the said four children of the settlor a succession to their respective interests in the settled funds and accumulations within the meaning of s. 2 of the Succession Duty Act, 1853, and accordingly succession duty at the appropriate rate—namely, 1 per cent., became payable upon the death of the settlor in respect of the interests in the settled funds and accumulations to which the said children became respectively entitled upon such death.

12. The defendants were the surviving trustees of the above mentioned indenture and were accountable as such trustees for the estate duty and succession duty payable in respect of the settled funds and accumulations as above mentioned.

13. The Commissioners of Inland Revenue had caused application to be made to the defendants for an account and

payment of the said duties respectively, but the defendants refused to deliver such accounts or to pay such duties, and contended that no such duties were payable.

The informant on behalf of His Majesty prayed (inter alia) as follows :—

1. That it might be declared that upon the death of the settlor estate duty at the appropriate rate became payable under the provisions of s. 1 of the Finance Act, 1894, in respect of the settled funds or alternatively under the provisions of s. 2, sub-s. 1, of the Finance Act, 1894, in respect of the interests in the settled funds and accumulations respectively arising at the date of such death to the four children of the settlor under the above mentioned indenture dated March 24, 1924.

2. That the defendants might be ordered to deliver an account of the estate duty so payable and the appropriate interest thereon, and to pay the amount of the said duty and interest to the Commissioners of Inland Revenue, the informant thereby waiving such penalties as the defendants might have incurred by reason of the said duty not having been paid up to the present time.

3. That it might be declared that upon the death of the settlor succession duty at the rate of 1 per cent. became payable under the provisions of s. 2 of the Succession Duty Act, 1853, in respect of the said interests in the settled funds and accumulations.

4. That the defendants might be ordered to deliver an account of the succession duty so payable and the appropriate interest thereon and to pay the amount of the said duty and interest to the Commissioners of Inland Revenue, the informant thereby waiving such penalties as the defendants might have incurred by reason of the said duty not having been paid up to the present time.

The defendants by their answer admitted the material allegations in the information and alleged that under the trusts in default of appointment and in the event which had happened—namely, the death of the settlor without having exercised save as mentioned in para. 4 of the information the power of appointment vested in him as stated in para. 5 thereof the children of the settlor were entitled to the capital and accumulations of the settled funds in the proportions mentioned in para. 7 of the information subject to their bringing into hotchpot the sums respectively applied for their benefit or appointed to them by the settlor during his lifetime, but they contended that the four children did not become entitled to the capital and accumulations of the said settled funds at the death of the settlor as alleged in para. 7 of the information.

Rowlatt J. held in favour of the Crown that both estate and succession duty attached and made declarations in the terms of paras. 1 and 3 of the prayer of the information and gave liberty to apply as to the other paragraphs if necessary.

The defendants appealed. The appeal was heard on January 21 and 22, 1932.

Spens K.C., *Raymond Needham K.C.*, and *P. M. Walters* for the appellants. The settled fund and accumulations did not pass on the death of the settlor so as to give rise to a claim to estate duty under s. 1 of the Finance Act, 1894: *Earl Cowley* v. *Inland Revenue Commissioners.* (1) Sect. 1 taxes property and not interests in property, and in order that it shall apply property must exist before and after the death which by reason of the death changes hands. Here the settled property did not change hands at the settlor's death. The beneficial interest was in the settlor's children before his death. They could together have dealt with the settled property before the settlor's death, for his only power was to appoint the settled property among them, though as regards three-fifths of the property this was subject to the remote contingency of another child being born.

[ROMER L.J. As to the three-fifths, there was also the contingency that all the daughters might die in the settlor's lifetime.]

That is so, but it does not affect the position as to the remaining two-fifths of the settled property. As regards the accumulations no one enjoyed any benefit in respect of them before the settlor's death—not even the settlor. There was, therefore, no change of interest as regards the accumulations on the settlor's death. As to both the fund and the accumulations, all his death did was to render impossible certain ways in which the title of a particular child could previously have been defeated. All the settlor's death did was to remove his power to appoint among the children and to put an end to the possibility of another child being born. It follows that the property as a whole never passed on his death. As regards two-fifths the son had a vested interest both before and after the death, and all that the death did was to remove the possibility of that interest being divested by an appointment. As regards the remaining three-fifths of the fund, the daughters were contingently entitled to it before the settlor's death, and all his death did was to remove the possibilities of their interests being divested: (*a*) by the birth of another child; (*b*) by their death in the settlor's lifetime; and (*c*) by the exercise of his power of appointment. In those circumstances no property can be said to have passed on his death, and no liability to estate duty arises under s. 1 of the Finance Act, 1894.

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(1) [1899] A. C. 198, 211.

The alternative claim to estate duty is based on s. 2, sub-s. 1 (*d*), of the Act of 1894, which charges duty on the beneficial interest in any annuity or other property provided by the deceased or accruing or arising by survivorship or otherwise on the death of the deceased. There is for this purpose a distinction between the capital of the settled fund, which was provided by the deceased, and the accumulations which were not provided by him. But there was in any case no difference in what the settlor's children were entitled to before or after death. For anything to be taxable under sub-s. 1 (*d*) some beneficial interest must either come into existence on the death or accrue on the death in the sense of enlarging an existing interest by an accretion to it: *Attorney-General* v. *Robinson* (1); *Inland Revenue Commissioners* v. *Scott's Trustees*. (2)

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(1) [1901] 2 I. R. 67, 89, 90. (2) (1918) 55 S. L. R. 654.

[GREER L.J. Can freedom from the risk of having a fund taken away be a beneficial interest arising at the death ?]

It is submitted not. There is a vital distinction between a beneficial interest arising or accruing at the death and the cesser of a power of appointment or the removal of the risk of a class being enlarged by reason of the death. Here both before and after the death the settlor's four children were the only persons interested in the fund. As to two-fifths the vested interest is in the son throughout, and as to the remaining three-fifths the three daughters were contingently entitled to it before the settlor's death, and all his death did was to remove contingencies. There was no new or additional beneficial interest.

But supposing s. 2, sub-s. 1 (*d*), were held to apply, it is only to the extent of the beneficial interest that arises or accrues which is subject to duty. It cannot be the whole interest, as has been suggested. The only increased value of the son's interest was that which resulted from the cesser of the risk of the property being divested from him by an appointment. It is clear that the son's share was vested subject to being divested before the settlor's death: *Lambert* v. *Thwaites* (1); *In re Master's Settlement.* (2) So too in the case of the three-fifths no new interest arises, but only a removal of contingencies. At most the benefit accruing is the difference between the value of contingent interests and vested interests.

Then as to succession duty, the question depends on s. 2 of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51). As regards the corpus of the fund there is a difficulty, having regard to the decision in *Attorney-General* v. *Gell* (3), in contending that succession duty does not attach. But it is submitted there is a distinction between the funds originally settled and the accumulations of income arising from those funds which were never the property of the settlor. As to these, it is submitted, no succession duty attaches: see *Lord Advocate* v. *Fleming.* (4)

(1) (1866) L. R. 2 Eq. 151.
(2) [1911] 1 Ch. 321.
(3) 3 H. & C. 615.
(4) [1897] A. C. 145, 152.

J. H. Stamp (*Sir Thomas Inskip S.-G.* with him) for the Crown.

[LORD HANWORTH M.R. We will not trouble you on the question of succession duty. The case is governed by *Attorney-General* v. *Gell* (1), to which Mr. Spens has referred.]

There is no difference for the purposes of s. 1 of the Finance Act, 1894, between the different kinds of reversionary interests. Whenever a future interest falls into possession by reason of death the property passes.

In *Attorney-General* v. *Milne* (2) it was laid down by Lord Haldane that the word "pass" in the section is used in its ordinary and natural meaning. If such a passing is established by the death, duty attaches. Lord Parker (3) indicated that if there is an actual change of possession, duty attaches. In the present case it was the titles alone which vested under the settlement which created the rights but did not pass the property. It is irrelevant whether those rights were vested or contingent, because the property itself did not pass until it fell into possession, which was not until the death of the settlor. The dispositions of the settlement were specially framed so as to hold the possession of the property in suspense during the lifetime of the settlor, so that each child's right to possession clearly arose for the first time on the death. There never was a clearer case of passing on the death.

[He also referred to *Earl Cowley* v. *Inland Revenue Commissioners.* (4)]

Spens K.C. replied.

LORD HANWORTH M.R. This appeal fails. It is an appeal from a judgment of Rowlatt J. upon an information brought by His Majesty's Attorney-General against trustees of a settlement dated March 24, 1924. The claim is made to estate and succession duty payable upon the death of the father of the defendant trustee, whose name was also John Weston Adamson. In order that one may not incur or not suffer the perils which Mr. Spens has suggested may follow

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(1) 3 H. & C. 615.
(2) [1914] A. C. 765, 770.
(3) [1914] A. C. 779.
(4) [1899] A. C. 198, 211.

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the result of this judgment, I think it is important to call attention to the actual facts upon which the case has to be decided. The settlor had four children, three daughters and one son, the son being the defendant trustee, and by the indenture of settlement that he made on the date to which I have already referred he handed over to certain trustees certain funds, and he dealt with them in this particular way. It is quite obvious, when one looks at the settlement, that he intended to keep during his lifetime the control of the funds and of the income which they produced.

By the first part of the settlement the settlor recites that he has paid certain sums out and out for the benefit of some of his children—namely, to John Weston Adamson the younger, the present defendant trustee, the amount of 9473*l*., to Mary Francis Cail, the daughter of the settlor, the amount of 10,000*l*., and to Clarice Muriel Weston Goodson, daughter of the settlor, 10,000*l*. Those were out and out gifts, a complete disposal of that part of his property.

By clause 3 the trustees "shall pay and apply the capital of the settled funds unto all or any of the children or child of the settlor now living or hereafter to be born in such shares and proportions and in such manner and at such time or times as the settlor may from time to time direct in writing and in default of such direction and so far as any such direction shall not extend the capital of the settled funds not so paid and applied shall be held by the trustees upon the trusts following." Shortly put, the trusts following were these, that if he did not by his direction in writing, or by deed or will, otherwise appoint, the son would take two-fifths of both the capital and the income of what was left at his death, and, with regard to the daughters, they were to have three-fifths, for equal division among his children other than the son, and there is a proviso that if the son died before he attained a vested interest in the settled funds under the foregoing trust, the two-fifths share should be added to the shares of the other children of the settlor, living at the death of the settlor, and held on the "like trusts as are hereinbefore declared with respect to the shares of such other children."

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It would appear, as Romer L.J. has suggested, that that proviso must be read: "Provided always that if the said son shall die before he attains a vested interest in possession." But I need not go further. It is abundantly plain from the terms of the settlement to which I have adverted that both as to capital and income which was to be accumulated the settlor retained his power during his lifetime to intervene and determine how the funds of the trust, both capital and income, should be disposed of. It was only when he had lost that power of volition by death that these other provisions come into effect.

Now Mr. Spens has said: "When one looks at those provisions it will be seen that the son took a vested interest in his two-fifths subject to its being divested. With regard to the three-fifths, the position is not so favourable to the daughters, because their interest was contingent. It was not determined as to either or any of them what was to be the sum which they would have received. That was left open. All the other children would take the three-fifths, or, rather, such of them as were living, at the settlor's death." The settlor died on March 11, 1928, without having exercised the power of appointment conferred upon him by the indenture, with the result that a claim is now made by the Crown for estate duty under the Finance Act, 1894, and for succession duty under the Succession Duty Act, 1853.

First, with regard to the estate duty under the Finance Act, 1894: it is said by Lord Macnaghten in *Earl Cowley* v. *Inland Revenue Commissioners* (1): "The principle upon which the Finance Act, 1894, was founded is that whenever property changes hands on death the State is entitled to step in and take toll of the property as it passes without regard to its destination or to the degree of relationship, if any, that may have subsisted between the deceased and the person or persons succeeding."

Sect. 1 of the Act in terms says that there is to be levied and paid a duty called estate duty upon the principal value ascertained as thereinafter provided of all property real or personal, settled or not settled, which passes on the death of such a person, and property passing on the death is by s. 2 to be deemed to include the categories which are stated in sub-paras. (*a*) to (*d*).

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(1) [1899] A. C. 198, 210.

Now what is the meaning of this word "passing" on the death? Lord Macnaghten interprets it by the words "changes hands." Lord Haldane in *Attorney-General* v. *Milne* (1) uses the words: "What happens is the event of passing in point of fact on death according to the natural meaning of the words." Lord Parker, referring to s. 1 of the Finance Act, 1894, in the same case says (2): "The expression 'passing on the death' is not further defined, but is evidently used to denote some actual change in the title or possession of the property as a whole which takes place at the death."

It does seem remarkable that, as Mr. Stamp has pointed out, there does not appear in the statute to be anything which separates or marks the distinction between vested and contingent interests. If there is anything in the Act which apparently refers to that at all, as Romer L.J. pointed out, it is in s. 22, sub-s. 1 (*l*), of the Finance Act, 1894, which says: "The expression 'property passing on the death' includes property passing either immediately on the death or after any interval, either certainly or contingently." So Mr. Stamp's observation seems well-founded, that you have to consider whether there is a passing of the possession of property upon the death, without examining carefully what is the nature of the interest the possession of which has passed, and if one is to interpret the words as, by the authority of Lord Haldane, Lord Macnaghten, and Lord Parker, it seems to be our duty to do—namely (I think I might use the phrase), in a popular sense, it would certainly be said by those who were considering what had happened to the children, to the son and to the daughters, that they had come into possession of the property according to the terms of the settlement upon the death of the father; the father had reserved full control both of capital and income until the day of his death, and thereafter that possession of his property had passed to his children. I feel it impossible to escape from the effect of the words of the Act and the interpretation so placed upon them, having regard to the facts of this case. I wish to guard myself in saying that that I am speaking of the facts of this case, because it may well be that distinctions must be taken, and finer lines drawn, in other cases; but upon this matter and this deed it would seem that there had been a passing of a right to the possession of property upon the death of the settlor which attracts a charge of estate duty.

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(1) [1914] A. C. 765, 770.

(2) [1914] A.C. 779.

With regard to the question of the succession duty Mr. Spens took a very candid course, as one would expect him to do, and he has called our attention to *Attorney-General* v. *Gell* (1), which was decided upon the Succession Duty Act, 1853, in the year 1865; and he has confessed that, having regard to the terms used by Pollock C.B. in that case, he does not feel able to support the appeal as to the corpus of what passed upon the death of the settlor. But he suggested that a distinction might still be drawn with reference to the income of the fund which was accumulated, and he called our attention to *Lord Advocate* v. *Fleming* (2), a case where the distinction was drawn as to the property to which a person had become entitled partly or wholly by the actions of the settlor, accompanied by a payment made to the insurance company; in other words, that it was not merely an act of the one person which completely dealt with the property. The property itself would have failed to exist if the premiums had not been paid, and they were paid by some one else. That is a decision in reference to and appropriate to the nature of the particular property in that case, but in the present case we are dealing with the accumulations of the fruit borne by the corpus of the funds settled. The fruit follows or belongs to the corpus in the sense that they are derived from the corpus. It was not any other act of any outside party that conferred or improved the possibility of the corpus being obtained. The accumulations naturally

(1) 3 H. & C. 615.

(2) [1897] A. C. 145.

arose from the funds which had been settled. In those circumstances I fail to see that any distinction can be drawn as between the corpus and the income which is accumulated. To both of those the reasoning of the Court of Exchequer in *Attorney-General* v. *Gell* (1) applies, and succession duty attaches.

On these grounds the appeal on both points fails, and must be dismissed.

GREER L.J. I am of the same opinion, and for the same reasons. I only desire to add one or two observations with regard to the argument addressed to us as to the effect of s. 1 of the Finance Act, 1894. In my judgment, Mr. Stamp was quite right in emphasizing the words of the section as applicable by its very terms to settled property. As I understood the argument of Mr. Spens so far as s. 1 was concerned, it was this: that s. 1 was intended to apply and only to apply where a person succeeded to the same thing which had been enjoyed by the deceased. In most cases of settled property s. 1, if that argument was right, would be wholly inapplicable, and the words "settled" or "unsettled" ought not to have been in the section. In the typical case of settled property A. takes for life the enjoyment of the settled property, and B. gets it in reversion; but B. does not get that which had been enjoyed by A., a life interest; he gets the remainder, and he gets it by a succession, though he does not take the same thing as had been enjoyed by his predecessor. It seems to me that the section is directed to cover the case where a successor comes into the enjoyment of the property by reason of the death of some predecessor who had the possession and enjoyment of it. In this case, until the death of the settlor, none of the children, as of right, had any enjoyment of the use of the property in question, whether it was corpus or accumulated income. Their father had the absolute control over it and, though he had divested himself of the power of appointing it to any other persons than the members of his family, he could, if he had chosen, have appointed the whole of it to any one of the members of the family, and, of course, the rights of the members of the family might have been affected by the possibility of a subsequent marriage and of additions to his family. In my judgment, the children succeeded to the property by reason of the terms of the settlement upon the death of the deceased. Within the words of s. 1 the property then passed to them free from the restrictions which applied to it during the life of the settlor. I agree with the argument put forward by Mr. Stamp that the case comes within s. 1 of the Act, and it is unnecessary to consider the special provisions of s. 2, though I think we must approach the decision of this question with knowledge that the object of Parliament was to put a tax upon persons who received property otherwise than by their own exertions, but came into it by reason of the death of some person which brought into existence their right of enjoyment of the property subject to tax. I do not think it is necessary to add anything to what my Lord has said with regard to the question of succession duty.

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(1) 3 H. & C. 615.

ROMER L.J. I have arrived at the same conclusion. As regards the question of succession duty, I have nothing to add to what has fallen from the Master of the Rolls. As to the question of estate duty, I should like to add just one or two observations. The case that we have to determine is a peculiar one, and the facts are such that, as far as I know, have never been present in a case before. Under the settlement the settlor reserved to himself during his life the power of directing to which of his children then living or thereafter to be born the capital of the settled funds should be paid. He accordingly directed that during his life the income pending his appointments, that is, pending his decision as to which of his children should take, should be accumulated and added to the capital. On his death, as I construe the settlement, the property would go as to two-fifths to his son, and as to three-fifths to his daughters, if they respectively survived him. The gift of the three-fifths to the daughters was expressed to be contingent on their surviving the settlor. The trust in favour of the son was not in terms expressed to be contingent, but there is a proviso which I construe as providing that in the event of the son dying before the father his two-fifths should go over to the three daughters, again only in the event of their surviving the settlor. The result of all that is that until the death of the settlor, although each one of his four living children who eventually did in fact obtain vested interests in the property in possession could say that he or she had some contingent interest in the property, it was quite impossible to define what that contingent interest was, that is to say, it was impossible to say that it was a contingent interest in one-fifth or two-fifths or any other proportion of the property; and, furthermore, if all his children should have predeceased the settlor, there would have been a resulting trust of the property in that event in favour of the settlor.

Now the question that we have to determine is whether on the death of the settlor the property, so far as he had not appointed it to his children, passed to the four children who in fact survived, within the meaning of s. 1 of the Finance Act, 1894.

It was pointed out by Lord Macnaghten in *Earl Cowley* v. *Inland Revenue Commissioners* (1), and it has been pointed out by other distinguished judges, that the scheme of the Finance Act, 1894, was that the State should step in and take a share of property whenever the property changes hands on a death. The property can change hands on a death, either by reason of the possession passing from one person to another, or by reason of a particular title to the property passing from one person to another. It seems to me that if a settlement were made which provided that during the life of the settlor the income of the property settled should be accumulated, and eventually held upon trust for one person in the event of his surviving the settlor, and that after the death of the settlor the capital upon which those accumulations had been made should be held upon trust for another person, on the death of the settlor the property would pass to the second person who was entitled to the capital. Can it make any difference that the accumulation is directed for a class

(1) [1899] A. C. 198, 210.

or for a number of persons of whom it may eventually turn out that the second person is one? In the present case the accumulation is directed for the benefit of these persons: any child of the settlor living at the date of the settlement or born to him thereafter. One cannot rule out the possibility of a child being born to him after the date of the settlement, because, whatever may have been the age of his then existing wife, he might have married again. The accumulation may also have been directed for the benefit of the settlor himself in a certain event—namely, the event of none of his children surviving him. In the events which have happened it turns out that the trust for accumulation was only for the benefit of the four surviving children, but it appears to me that none the less the property passed to these children on the death of the settlor just as much as it would have passed to them on his death if the trust for accumulation had been directed to have been made for some other persons altogether.

It is said by Mr. Spens that nothing has passed; that the children were the only persons interested beneficially before the death of the settlor, and the same children are the only persons beneficially entitled after his death; but, in point of fact, as will be seen from what I have already said, whereas before the death of the settlor it was impossible to say what the beneficial interests of the children were (and, in point of fact, it might have turned out that they never would have become entitled to any beneficial interest at all), on the death of the settlor the son became indefeasibly entitled to two-fifths, and each of the three daughters became beneficially and indefeasibly entitled to one-fifth.

For these reasons, although I think the case is a difficult one, I have come to the conclusion that the property did on the death of the settlor pass to these four children. I agree, therefore, that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellants: *Middleton, Lewis & Clarke, for Middleton & Co., Sunderland.*

Solicitor for the Crown: *Solicitor of Inland Revenue.*

W. I. C.

Not followed. RAMA CORPN., LTD. *v.* PROVED TIN & GENERAL INVESTMENTS, LTD. [1952] 1 All E.R. 554.

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BRITISH THOMSON-HOUSTON COMPANY, LIMITED *v.* FEDERATED EUROPEAN BANK, LIMITED.

[1931. B. 4146.]

Not followed. RAMA CORPN. *v.* PROVED TIN, ETC. [1952] 1 Q.B. 147

ot followed. RAMA ORP. *v.* PROVED IN, ETC. [1952] 2 Q.B. 147

Company—Articles of Association—Power of Board of Directors—Delegation to single Director—Contract—Ostensible Authority—Presumption of Delegation.

By the articles of association of a Company the directors had power to delegate to one or more of their own body such of the powers conferred on the directors as they might consider requisite for carrying on the business of the Company, and to determine who should be entitled to sign contracts and documents on the Company's behalf. A document purporting to be a guarantee was given to the plaintiffs executed by the Company in this form: "The F. E. B., Ld., signed N. P." N. P. was a director of the Company. During the negotiations for the giving of the guarantee he had written to the plaintiffs, signing the letter "for and on behalf of" the Company, "N. P., Chairman."

On these facts, in an action on the guarantee:—

Held, that the plaintiffs were entitled to presume that the directors of the Company had authorized N. P. to sign contracts on behalf of the Company, and that the Company was liable on the guarantee.

Houghton & Co. v. *Nothard, Lowe & Wills, Ld.* [1927] 1 K. B. 246; [1928] A. C. 1 considered; *Kreditbank Cassel* v. *Schenkers, Ld.* [1927] 1 K. B. 826 followed.

Judgment of Macnaghten J. affirmed.

APPEAL from the judgment of Macnaghten J. in an action tried before the learned judge without a jury.

The action was brought to recover 80*l.* alleged to be due under a guarantee in writing dated June 11, 1931, given by the defendants to the plaintiffs to secure payment of certain moneys due from a company named Harris Williams (Servis), Ld., as the price of goods supplied by the plaintiffs to that company. The writ was specially indorsed. The plaintiffs issued a summons for leave to sign final judgment under Order XIV., r. 1. The guarantee was in the following form:—

"The Federated European Bank, Limited, 21 Soho Square, London, W. 1. 11 June, 1931. To the British Thomson-Houston Co., Ld., Rugby.

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"In consideration of your supplying or continuing to supply goods to Harris Williams (Servis), Ld., of 180 Albion Road, Stoke Newington, London, N. 16. We hereby guarantee the payment of your account with them up to the sum of 200*l.* (two hundred pounds) for three months from the date hereof, and you are at liberty to give any time or indulgence to the said Harris Williams (Servis), Ld., for the whole or any part of your account without discharging us. The Federated European Bank, Ld. (Signed) N. Pal."

In answer to the summons for judgment the manager of the defendant Company made an affidavit stating that the Company had not executed the guarantee, as any guarantee by them had to be executed by two directors. (1) The Master gave the defendants leave to defend, and ordered that the case should be heard by a judge without a jury. At the trial it was admitted by the defendant Company that N. Pal was the chairman of the board of directors. It appeared that on June 6, 1931, he had offered the plaintiffs a form of guarantee signed by himself for and on behalf of the defendants as "Chairman," but the plaintiffs would not accept a guarantee in that form, and the form of June 11 was sent by the plaintiffs to the defendants and signed as above stated.

On these facts Macnaghten J. gave judgment for the plaintiffs.

The defendants appealed. Soon after the argument began, Scrutton L.J. called for the articles of association of the appellant company, and these were produced. They contained among others the following :—

"106. The directors shall have power . . . . (3.) To delegate to any managing director, local board, committees or agents or to one or more of their own body or to any manager or other officer such of the powers and authorities hereby conferred on the directors (other than the powers to borrow and make calls but including power to sub-delegate) as they may consider requisite for carrying on the business of the Company or any portion thereof and from time to time to revoke all or any of the powers so delegated." . . . .

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(1) It appeared from the articles of association that two directors formed a quorum of the board.

"(8.) To determine who shall be entitled to sign on the Company's behalf bills, notes, receipts, acceptances, indorsements, cheques, releases, contracts, and documents."

Among the directors, who were four in number, were Diomede Caprotti, an Italian, Nichola Pal, a Hungarian, and Francisco Petrelli, an Italian.

Turrell for the appellants. One director has no power to pledge the credit of the company of which he is a director, unless the power to do so is conferred on him by the articles of association. These were not before the learned judge, and he ought therefore to have given judgment for the defendants, the present appellants.

Now that the articles have been produced they do not help the respondents. It is true that for certain purposes those who have dealings with a company are affected with notice of the contents of the memorandum and articles of association: *Mahony* v. *East Holyford Mining Co.* (1) Thus the respondents may be credited with knowledge that the appellants' board of directors had power to delegate to one of their body power to give the guarantee in question. If it were the fact that the directors had purported to delegate this power, the appellants might be relieved of the duty of inquiring whether the formalities prescribed by the articles in order to effect a delegation had been duly observed; for this would be a matter of the indoor management of the respondents, with which the appellants have no concern: *Mahony* v. *East Holyford Mining Co.* (1); cf. *Royal British Bank* v. *Turquand* (2) and *County of Gloucester Bank* v. *Rudry Merthyr Colliery Co.* (3) But if the question is whether in fact the directors have or have not ever delegated or purported to delegate the power, this is more than a matter of indoor management, but is of the essence of the plaintiffs' case; and the persons who rely on the delegation, in this case the respondents, must prove that the directors have delegated or purported to delegate the power: *Premier Industrial Bank* v. *Carlton Manufacturing Co.* (1); *Houghton & Co.* v. *Nothard, Lowe & Wills, Ld.* (2) On this issue they have offered no evidence, but have simply assumed, contrary to the law, that one director has power to pledge the credit of a company.

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(1) (1875) L. R. 7 H. L. 869, 893, 894.

(2) (1855) 5 E. & B. 248; (1856) 6 E. & B. 327.

(3) [1895] 1 Ch. 629.

F. T. Atkins for the respondents. The learned judge came to the right conclusion. This case falls within the words of Atkin L.J. in *Kreditbank Cassel* v. *Schenkers, Ld.* (3): "If you are dealing with a director in a matter in which normally a director would have power to act for the company you are not obliged to inquire whether or not the formalities required by the articles have been complied with before he exercises that power." There is no reason to suppose that N. Pal was usurping authority when he signed letters on behalf of the appellants as chairman of the board of directors. The proper inference is that he was held out by the appellants as authorized to sign letters and contracts on their behalf. *Royal British Bank* v. *Turquand* (4) and *Biggerstaff* v. *Rowatt's Wharf, Ld.* (5) lay down the principle of which *Kreditbank Cassel* v. *Schenkers, Ld.* (3) and the present case are instances.

[Sect. 29, sub-s. 1 (*b*), of the Companies Act, 1929, was also referred to.]

Turrell in reply.

SCRUTTON L.J. In this case the defendants have raised a purely technical point without any merits. The plaintiffs were supplying goods to Harris Williams (Servis), Ld., who required a guarantee from the defendants, a banking company with a high-sounding name whose directors were one N. Pal, who was a Hungarian, an Englishman and two Italians. N. Pal was the chairman of the board of directors. On June 6, 1931, he sent a form of guarantee which he signed as "Chairman." The plaintiffs did not approve of this form, and sent another form which N. Pal signed in the name of the defendants and returned to the plaintiffs on June 11. The action is brought on this guarantee.

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(1) [1909] 1 K. B. 106.

(2) [1927] 1 K. B. 246; in H. L. [1928] A. C. 1.

(3) [1927] 1 K. B. 826, 844.

(4) (1855) 5 E. & B. 248; (1856) 6 E. & B. 327.

(5) [1896] 2 Ch. 93.

One defence raised is that the defendant Bank have not executed it, because by their articles of association any guarantee of the bank requires to be executed by two directors. At the trial neither party put in the articles of association. Mr. Turrell for the defendants took the point that one director had no authority to pledge the credit of the Company. In view of the decision of the House of Lords in *Mahony* v. *East Holyford Mining Co.* (1), that those who have dealings with a company are affected with notice of all that is contained in its memorandum and articles of association, we asked to see the articles of association of the defendant Company. Now we have seen them, and we find that they confer upon the directors two powers: (1.) to delegate to one or more of their number any of the powers of the board of directors, and (2.) to decide who shall sign contracts and other documents on the Company's behalf. Then *Royal British Bank* v. *Turquand* (2) and *Mahony* v. *East Holyford Mining Co.* (1) decide that if the articles of association give a power, persons dealing with the company, though they are deemed to have notice of the extent of the power, are not bound to inquire into what is called the "indoor management" of the company to see whether the power has been properly and regularly exercised with all the prescribed formalities, and if they find an officer of the company openly exercising an authority which the directors have power to confer upon him, they are relieved from the duty of further inquiry and are entitled to assume that the power has been regularly and duly conferred.

A difficulty in the way of the plaintiffs is raised by the judgment of Sargant L.J. in *Houghton & Co.* v. *Nothard, Lowe & Wills, Ld.* (3), where one director of a company purported to pledge certain future profits of the company by a contract which was said to be beyond his powers. It was a question whether his act was or was not within the powers conferred by one of the company's articles of association. Sargant L.J. held, and Atkin L.J. agreed with him, that, assuming that the articles enabled the directors to delegate to the particular director power to perform the act, it was not enough for the pledgees to rely upon their constructive knowledge of the effect of the articles where the power of delegation had not in fact been exercised and where the pledgees had no actual knowledge that the power existed, and did not rely on its existence. This case was considered in *Kreditbank Cassel* v. *Schenkers, Ld.* (1), where, besides the decision in *Houghton's* case (2), there were other good reasons disentitling the plaintiffs from recovering; first, they were seeking a remedy against the drawers of a bill whose names had been forged; secondly, the person who was vouched as having authority to sign the names of the drawers was one whose position must have raised doubts whether such authority would ever have been reposed in him. All three members of the Court held that the facts of the case ought certainly to have put the plaintiffs upon inquiry before they discounted the bill; they also held that as the drawers' names were forged they were not liable upon the bill; and thirdly, they held themselves bound to follow the decision in *Houghton's* case. (2) But Atkin L.J. held that in certain circumstances the inquiry, whether directors have in fact nominated one of their number to do the act relied on, need not be made—namely, where directors have power to nominate one of their number to do acts on their behalf, and a director is found acting in a matter in which normally a director would have power to act for his company. In that case, in the view of Atkin L.J., a person dealing with the company would not be obliged to inquire whether the director had been formally invested with authority to do the act. Assuming that to be correct, in the present case we have a director acting in matters which are normally entrusted to directors. The learned judge held that the chairman of a board of directors, a title which N. Pal is permitted to assume, was a person acting normally in the affairs of the defendant Company. In my opinion he came to the right conclusion. The plaintiffs were entitled to assume that N. Pal was duly authorized to act for the Company, and this appeal must be dismissed.

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(1) L. R. 7 H. L. 869.

(2) 6 E. & B. 327.

(3) [1927] 1 K. B. 246; on appeal [1928] A. C. 1.

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(1) [1927] 1 K. B. 826.
(2) [1927] 1 K. B. 246.

GREER L.J. I am of the same opinion. If it were necessary for the decision of this case to apply the first ruling, as stated in the headnote to *Houghton & Co.* v. *Nothard, Lowe & Wills, Ld.* (1), I should find myself in some difficulty. One of the propositions of law there stated is: "Although a person who contracts with an individual director or servant of a company, knowing that the board of directors has power to delegate its authority to such an individual, may under certain circumstances assume that that power of delegation has been exercised and that he may safely deal with the individual in question as representing the company, he cannot rely on the supposed exercise of such power if he did not know of the existence of the power at the time that he made the contract." If I rightly understand the decision in that case, it proceeds upon that proposition as good law. But it is not necessary for me to inquire whether it was an essential element in the ratio decidendi, because there are in this case adequate grounds upon which we can rest a decision apart from *Houghton's* case. (1) In the case before us the guarantee was signed by a person who was the chairman of the board of directors. Some one must represent the Company for the purpose of conducting correspondence, it may be a secretary, or the managing director, or some other officer; and he must have authority to bind the Company by letters written on its behalf. The person chosen by the defendants for this purpose was the chairman of the board, and the defendants have represented by their chairman that the plaintiffs could rely on the guarantee of the defendants as the act of the defendants and are responsible for those acts which they have held him out as having authority to perform. That is enough to decide this case; I reserve for further consideration the question how the first ruling in *Houghton's* case (1) is to be reconciled with *Mahony* v. *East Holyford Mining Co.* (2)

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(1) [1927] 1 K. B. 246.

(2) L. R. 7 H. L. 869.

SLESSER L.J. I agree. Speaking generally of the articles of association of the Company and of the powers of the Manchester manager in *Kreditbank Cassel* v. *Schenkers, Ld.* (1) Atkin L.J. says: "The person" (who relies on the articles) "is to be in the same position as if he had read them, and if he had, all that he would see would be that the directors had power to nominate the particular individual who could sign bills of exchange. In such a case a person reading the articles would be in no better a position unless he went further and inquired whether or not the directors had in fact nominated that particular individual to sign the bills." But the Lord Justice points out, as an exception, a case where this further inquiry need not be made, as follows: "If you are dealing with a director in a matter in which normally a director would have power to act for the company you are not obliged to inquire whether or not the formalities required by the articles have been complied with before he exercises that power." Here we are dealing with a company having four directors, of whom N. Pal describes himself as the Chairman and, in one case, signs a document as "N. Pal, Chairman." In my opinion the plaintiffs were dealing with N. Pal in a matter in which normally a director would have power to act. The difficulty arising on the decision in *Houghton & Co.* v. *Nothard, Lowe & Wills, Ld.* (2), therefore, does not press me in the present case, where, in the circumstances, the plaintiffs were entitled to assume that they were dealing with a person who had the authority of the defendant Company to execute the contract sued on.

Appeal dismissed.

Solicitor for appellants: *S. Fraulo.*
Solicitors for respondents: *Cochrane & Cripwell.*

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(1) [1927] 1 K. B. 826, 844.

(2) [1927] 1 K. B. 246.

W. H. G.

NOTE.—The authorities seem to warrant the following propositions:— If in an action against a limited company the plaintiff relies upon an act of an officer of the company, then

(1.) If the company has only a limited power to do the act, e.g., a power to borrow up to a certain amount, the plaintiff is affected with notice of the limitation: *Fountaine* v. *Carmarthen Ry. Co.* (1868) L. R. 5 Eq. 316.

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(2.) If the articles of association of the company give the officer authority to do the act provided certain directions are observed, and the officer purports to do the act, the plaintiff is entitled to assume that the directions have been followed: *Royal British Bank* v. *Turquand* (1855) 5 E. & B. 248; (1856) 6 E. & B. 327; *In re Land Credit Co. of Ireland* (1869) L. R. 4 Ch. 460; *Mahony* v. *East Holyford Mining Co.* (1875) L. R. 7 H. L. 869; *County of Gloucester Bank* v. *Rudry Merthyr Colliery Co.* [1895] 1 Ch. 629.

(3.) If the articles merely empower the directors to delegate to an officer authority to do the act, and the officer purports to do the act, then—

(*a*) if the act is one which would ordinarily be beyond the powers of such an officer, the plaintiff cannot assume that the directors have delegated to the officer power to do the act; and if they have not done so, the plaintiff cannot recover: *Premier Industrial Bank* v. *Carlton Manufacturing Co.* [1909] 1 K. B. 106 (dissented from in *Dey* v. *Pullinger Engineering Co.* [1921] 1 K. B. 77; *sed quaere*); *Houghton & Co.* v. *Nothard, Lowe & Wills, Ld.* [1927] 1 K. B. 246; in H. L. on another point [1928] A. C. 1. But

(*b*) if the act is one which is ordinarily within the powers of such an officer, then the company cannot dispute the officer's authority to do the act, whether the directors have or have not actually invested him with authority to do it: *Mahony* v. *East Holyford Mining Co.* L. R. 7 H. L. 869; *Biggerstaff* v. *Rowatt's Wharf, Ld.* [1896] 2 Ch. 93, 102, 106; *Dey* v. *Pullinger Engineering Co.* [1921] 1 K. B. 77; *Kreditbank Cassel* v. *Schenkers, Ld.* [1927] 1 K. B. 826, and the principal case.

It is submitted that actual knowledge on the part of the plaintiff of the contents of the articles of association is irrelevant except to an issue raised as to his bona fides.

W. H. G.

MORGAN CRUCIBLE COMPANY, LIMITED *v.* INLAND REVENUE COMMISSIONERS.

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March 11.

Revenue—Income Tax—Excess Profits—Trade Profits—Deductions—Pensions to Retiring or Incapacitated Employees—Purchase of Annuities by Employers to countervail Pensions—Annuities received by Employers—"Money wholly and exclusively laid out . . . . for the purposes of the trade"—Income or Capital Expenditure—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D—Rules applicable to Cases I. and II., r.* 3.

A company in 1883 inaugurated a scheme under which pensions were paid to its employees who had retired or become incapacitated, but reserving an uncontrolled discretion to vary or cease payment of such pensions. The payment of such pensions had ever since 1883 been a recurring business expense, and the pensions paid had been debited to the profit and loss accounts under the heading of wages, and were admitted to have been proper deductions in computing the profits of the company for income tax purposes. In 1918 the company entered into an arrangement with an insurance company whereby the insurance company undertook, in consideration of the sum of 23,100*l*. paid to it by the company, to pay to the company during the remainder of the lives of the persons who were receiving pensions, and who were named in the schedule to the policy, annuities which were equal in amount to the pensions which were being paid by the company in pursuance of its pension scheme. The amounts received from the insurance company under the policy were paid direct to the company, and payments equivalent to the annuities received from the insurance company were made by the company to the pensioners. The company had full power to stop the payment of any pension in case of misconduct, but in fact no pension had been withdrawn. The pensioners did not at any time know of the existence of the policy. The company had power in certain events to cancel the policy and claim repayment of part of the purchase money. The company claimed that the sum of 23,100*l*. should be allowed as a deduction in computing the amount of its deficiency for the purposes of excess profits duty for the accounting period ending in 1919:—

Held, affirming the Commissioners, that the company had not by the payment of 23,100*l*. got rid of their liability to pay the pensions to their retired or incapacitated employees, but had thereby acquired an asset, and that therefore the 23,100*l*. constituted a capital expenditure and could not be allowed as a deduction by reason of r. 3 (*f*) of the Rules applicable to Cases I. and II. of Sch. D to the Income Tax Act, 1918.

CASE stated by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court.

At a meeting of the Commissioners held on January 14, 1931, the Morgan Crucible Company, Ld. (hereinafter called "the appellant company"), appealed against the disallowance of a deduction of a sum amounting to 23,100*l.* from its profits in computing the amount of its deficiency for the purposes of excess profits duty for the accounting period ending in 1919.

The appellant company was incorporated on June 18, 1930, in pursuance of a scheme of arrangement and reconstruction sanctioned by an order of the High Court of Justice, Chancery Division, dated June 6, 1930, whereby the appellant company acquired and took over all the businesses, assets and liabilities then existing of the Morgan Crucible Company, Ld., incorporated in the year 1890 (hereinafter referred to as "the old company"). For the purposes of taxation the appellant company had been treated as successor to the old company.

The business of the old company was that of manufacturers of crucibles and carbon brushes, and since its incorporation such business was carried on continuously at its works at Battersea, and the same business was being carried on by the appellant company.

In or about the year 1883 the predecessors of the old company set up a scheme under which pensions were paid to its employees who had retired or become incapacitated, reserving the uncontrolled discretion to vary or cease payment of such pensions.

The payment of such pensions had ever since 1883 been a recurring business expense, and the pensions paid had been debited in the profit and loss accounts of the old company under the heading of wages, and had been deducted and were admitted to have been proper deductions in computing the profits of the company for income tax purposes.

In or about the end of the year 1918 or the early part of 1919 the board of directors of the old company decided that it would be prudent and in the interests of its business to purchase on its behalf annuities on the lives of those persons who had been granted and were receiving pensions under the said pension scheme. Negotiations were accordingly entered into with the Equitable Life Assurance Society for the purchase from that society of annuities payable during the lives of the surviving persons who were receiving pensions of amounts equivalent to their respective pensions. No alteration was then, or within the relevant period, made in the pensions scheme, and the pensions continued to be paid as before by the company to the pensioners and debited to wages in the accounts.

Pamphlets entitled "Voluntary Benefit Scheme for the Weekly Employees," marked A and B, dated respectively July, 1912, and January, 1915, were annexed to and formed part of the case. These pamphlets showed the method and terms upon which pensions were granted.

As the result of these negotiations a policy was on March 5, 1919, issued by the Equitable Life Assurance Society, under which that society undertook, in consideration of the sum of 23,100*l.* paid to it by the old company, to pay to the old company during the remainder of the life of each of the pensioners named in the schedule to the policy annuities of the respective amounts stated in the said schedule by quarterly instalments, the first of which should fall due on April 1, 1919.

The said policy was dated as of December 31, 1918, as the annuities payable under it were payable as from January 1, 1919, but it was in fact executed on March 5, 1919. A copy of the policy marked C was annexed to and formed part of the case. The policy contained a clause "that in the event of the judgment in *Hancock* v. *General Reversionary and Investment Co.* (1) being reversed within one year from this date or in the event of the taxing authorities disallowing the payment of the sum of 23,100*l.* as a deduction in assessing excess profits duty for the year 1918 the Society will on delivery of this policy duly discharged return to the company the sum paid to the Society after deducting therefrom any sums paid by the Society and with interest on the amount so returned at three per cent. per annum."

The said policy was cancelled as to certain annuities in 1924, and the old company received 7000*l.* in consideration of this cancellation. The pensioners did not at any time

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(1) [1919] 1 K. B. 25; 7 Tax Cas. 358.

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know of the existence of the policy, nor were they consulted as to this cancellation.

The amount undertaken in pursuance of the said policy to be paid by the society to the old company during the remainder of the life of each respective pensioner, shown in the schedule to the policy, was equal in amount to the amount of the pension which was being paid by the old company to him in pursuance of its pension scheme.

The old company in its accounts debited at December 31, 1918, a sum of 23,500*l.* to wages account, which was the estimate then made of the cost of the policy above referred to. In 1919 it credited to wages account 400*l.*, being the difference between the 23,500*l.* charged and the 23,100*l.* actually paid, and also credited 2151*l.* 8*s.*, being the amounts of the annuities received for the year under the policy after the deduction of 101*l.* 18*s.* 4*d.* income tax from certain of the annuities. Similar amounts were received by the old company and credited to wages account in each subsequent year, the totals diminishing as annuities ceased through the deaths of the pensioners, and also, from 1924, through the cancellation of certain annuities referred to above.

The following schedule sets out the annuities received by the old company :—

Year to 31 Dec.	Monthly employees. Gross.			Income tax deducted.			Net.			Weekly employees.			Total.		
	£	s.	d.	£	s.	d.	£	s.	d.	£	s.	d.	£	s.	d.
1919 ..	781	18	0	101	18	4	679	19	8	1471	8	4	2151	8	0
1920 ..	661	18	0	63	0	0	598	18	0	1339	0	0	1937	18	5
	Total amount credited to wages by the old company within the E.P.D. period												4089	6	0
1921 ..	661	18	0	63	0	0	598	18	0	1199	5	0	1798	3	0
1922 ..	661	18	0	55	2	6	606	15	6	968	11	0	1575	6	6
1923 ..	535	10	8	38	2	1	497	8	7	949	0	0	1446	8	7
1924 ..	278	2	8	13	10	0	264	12	8	224	5	0	488	17	8
1925 ..	218	16	0	13	7	9	205	8	3	—			205	8	3
1926 ..	166	0	8	12	0	0	154	0	8	—			154	0	8
1927 ..	157	16	0	12	0	0	145	16	0	—			145	16	0
1928 ..	157	16	0	12	0	0	145	16	0	—			145	16	0
1929 ..	157	16	0	12	0	0	145	16	0	—			145	16	0
1930 ..	157	16	0	12	0	0	145	16	0	—			145	16	0
	£4597	6	0	£408	0	8	£4189	5	4	£6151	9	4	£10,340	14	8

SUMMARY.

	Gross.			Net.		
	£	s.	d.	£	s.	d.
Total monthly	4597	6	0	4189	5	4
Total weekly	6151	9	4	6151	9	4
Cash receipt on surrender of the weekly annuities in 1924	7000	0	0	7000	0	0
Total receipts by the old company from the policies up to December 31st, 1930 .	£17,748	15	4	£17,340	14	8

Evidence was given, which the Commissioners accepted, that the amounts received under the said policy were paid direct to the old company, and that payments similar in amount to the annuities received from the society were made by the old company to the pensioners. The old company had full power to stop the payment of any pension in case of misbehaviour; although in fact no pension had been withdrawn. The old company had 1200 employees.

The said sum of 23,100*l*. had been paid by the old company in 1919 out of its profits.

It was contended on behalf of the appellant company that the said sum of 23,100*l*. should be allowed as a deduction from the profits in computing the deficiency for the purposes of excess profits duty for the said accounting period.

It was contended on behalf of the respondents (inter alia) :—

(A) That deduction of the said sum of 23,100*l*. in computing the profits and gains of the appellant company was not allowable under r. 3 of the Rules applicable to Cases I. and II. of Sch. D of the Income Tax Act, 1918, in that—

(*a*) The said sum was not money wholly and exclusively laid out or expended for the purposes of the trade of the appellant company : r. 3 (*a*).

(*b*) The said sum was capital employed or intended to be employed as capital in such trade : r. 3 (*f*).

(*c*) The said sum was a sum recoverable under an insurance or contract of indemnity : r. 3 (*k*).

(B) That under the Finance (No. 2) Act, 1915, Fourth Schedule, para. 5, no deduction in the computation of the profits of the appellant company of the said sum of 23,100*l*. was allowable, in that payment of the said sum was a transaction or operation which would artificially reduce the amount of the profits of the trade of the appellant company.

(C) In the alternative, that under para. 3 of the said Schedule, if the said sum of 23,100*l.* was an allowable deduction under the Income Tax Acts, then only such amount of the said sum as appeared to the respondents to be reasonably and properly attributable to the accounting period ended in 1919 should be allowed as a deduction in computing the profits of the appellant company for that period.

The Commissioners held that the said sum of 23,100*l.* was wholly and exclusively laid out or expended for the purposes of the old company's trade, but that it constituted capital expenditure and was prohibited as a deduction from the profits in arriving at the computation under the provisions of r. 3 (*f*) of the Rules applicable to Cases I. and II., Sch. D, of the Income Tax Act, 1918. They further held that the transaction in question was not one which would artificially reduce the amount of the profits of the trade of the appellant company within the meaning of the Finance (No. 2) Act, 1915, Fourth Schedule, para. 5. They dismissed the appeal.

The representative of the appellant company immediately upon the determination of the appeal declared his dissatisfaction therewith as being erroneous in point of law, and in due course required the Commissioners to state a case for the opinion of the High Court pursuant to the Finance (No. 2) Act, 1915, s. 45, sub-s. 5, and the Taxes Management Act, 1880, s. 59, which case the Commissioners stated and signed accordingly.

Raymond Needham K.C. and *Scrimgeour* for the appellants, the Morgan Crucible Company, Ld. The sum of 23,100*l.*, which was paid to the insurance company for the payment to the appellant company of annuities equivalent to the pensions paid by the appellants to their former employees, is a proper deduction out of the annual profits and gains of the appellant company, and therefore not subject to income tax. It is not capital withdrawn from the appellants' trade or a sum intended to be employed by them as capital in their trade. It is therefore not within the prohibition contained in r. 3 (*f*) of the Rules applicable to Cases I. and II. of Sch. D of the Income Tax Act, 1918. It is a lump sum paid in purchasing annuities in lieu of annual pensions. The payment of the lump sum saved the appellants the payment in the future of pensions which were payable out of the annual profits and gains of the appellants and which were not liable to tax. It was held in *Hancock* v. *General Reversionary and Investment Co.* (1) that a sum expended in the purchase of an annuity in lieu of a retiring allowance of a servant was an admissible deduction. That decision is directly in point here. The contention on behalf of the Crown will be that that case is distinguishable, inasmuch as there the policy was handed over to the pensioner who took the annuity paid under the policy, whereas in the present case the appellant company and not the pensioners received the annuities paid under the policy, and the appellants retained control over the pensions. The Commissioners have, however, found that the sum of 23,100*l.* was wholly and exclusively laid out or expended for the purposes of the old company's trade, and therefore the sum must be allowed as a deduction unless it comes within r. 3 as a capital expenditure. It is true that the Commissioners also go on to find that the sum constituted capital expenditure and was therefore prohibited as a deduction from the profits. It has, however, been laid down in several cases that a lump sum payment made in order to satisfy payments on account of income is not a capital expenditure. Lush J., in *Hancock's* case (2), cited Rowlatt J. as laying down in *Ounsworth* v. *Vickers, Ld.* (3), the proper test to apply, as follows: "Was the expenditure incurred in order to meet a continuing business demand, in which case it should be treated as an ordinary business expense and an admissible deduction, or was it an expenditure incurred once for all, in which case it should be treated as a capital outlay?" Lord Hanworth M.R., in *Mallett* v. *Staveley Coal and Iron Co.* (4), referred to *Hancock's* case (1) as a case "in which the item dealt with was a matter of revenue, a matter of ordinary working entirely," and added that "there could not have been a capital outlay in respect of the pension to the pensioner"; and later he said that "the distinction to be drawn between the activities of the circulating capital and the purpose of the fixed capital must always be borne in mind." In *British Insulated and Helsby Cables* v. *Atherton* (1) a payment of 31,784*l.* was held to be in the nature of capital expenditure and therefore not an admissible deduction, because the contribution was made in order to form the nucleus of a pension fund, and, as Lord Cave L.C. pointed out (2), "so to obtain for the company the substantial and lasting advantage of being in a position throughout its business life to secure and retain the services of a contented and efficient staff." In that case *Hancock's* case (3) was distinguished, but several of the Law Lords said that that case was correctly decided. In *Anglo-Persian Oil Co.* v. *Dale* (4) a payment of 300,000*l.* in order to terminate an onerous agency agreement was held by the Court of Appeal to be a revenue payment, and deductible by the company in ascertaining its net profits. Lord Hanworth M.R. again approved of *Hancock's* case (3), and said (5) that "the test of fixed or circulating capital is the true one."

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(1) [1919] 1 K. B. 25; 7 Tax Cas. 358.

(2) [1919] 1 K. B. 37; 7 Tax Cas. 371.

(3) [1915] 3 K. B. 267, 273; 6 Tax Cas. 671, 675.

(4) [1928] 2 K. B. 405, 418; 13 Tax Cas. 772, 784.

Sir Thomas Inskip A.-G. and *R. P. Hills* for the respondents. In the present case the scheme was one for the voluntary payment by the appellants of benefits to their former servants, and not one for the establishment of a fund of which the pensioners were to be cestuis que trust. The payment of the 23,100*l.* was not made with the intention that the policies which would be taken out should be handed over to the pensioners who had been receiving voluntary benefits. The payment of this sum was in the nature of a capital expenditure made for the creation of an asset. Lord Cave L.C. laid down the test to be applied in *Atherton's* case (6), when he said: "But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital." It is true that Lord Cave in that case thought that *Hancock's* case (1) was rightly decided on its facts, but Lord Atkinson expressed his doubt as to soundness of the decision in *Hancock's* case (1), and Lord Buckmaster said that *Hancock's* case (1) was "nothing but the payment in one sum of an annual recurring liability." Warrington L.J., also in *Atherton's* case (2) in the Court of Appeal, declined to say whether he thought *Hancock's* case (1) was correctly decided, and added that if the question arose again in the exact form in which it did in *Hancock's* case (1) they might have to consider it. *Hancock's* case (1) is a decision on the special facts of that case, but it is no authority in the present case. Here the policy was not taken out with the object of getting rid of an annual recurring liability, as in *Hancock's* case (1), but the payment was made with a view to the bringing into existence of an asset. The investment of the 23,100*l.* was not made for the benefit of the pensioners; the sums that are annually received by the appellants from the insurance company do not enure for the benefit of the pensioners, but for the benefit of the appellants themselves. The appellants received from the insurance company each year under the policy a sum of money which was the same as the pensions paid by them to the pensioners. *Anglo-Persian Oil Co.* v. *Dale* (3) is a very different case from the present on its facts. There the payment, which was held to be a revenue payment, was made in order to get rid of an onerous contract. The cardinal fact of the present case is that the payment of the 23,100*l.* was made for the creation of an asset in which the pensioners have no interest. If a pensioner forfeited his pension by reason of misconduct, or if the appellants ceased to pay the pensions, as they had the right to do, the insurance company would nevertheless still have to make the annual payments under the policy to the appellants, as those payments endured so long as the pensioners lived and not merely so long as the pensions were paid, and the pensioners would not have any right or interest in those payments by the insurance company; they would enure merely for the benefit of the appellants.

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(1) [1926] A. C. 205; 10 Tax Cas. 155.

(2) [1926] A. C. 214; 10 Tax Cas. 193.

(3) [1919] 1 K. B. 25; 7 Tax Cas. 358.

(4) [1932] 1 K. B. 124.

(5) Ibid. 138.

(6) [1926] A. C. 213; 10 Tax Cas. 192.

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(1) [1919] 1 K. B. 25; 7 Tax Cas. 358.

(2) [1925] 1 K. B. 421, 437.

(3) [1932] 1 K. B. 124.

Raymond Needham K.C. replied.

Rowlatt J. In this case there was a pension scheme set up by the predecessors of the appellant company, not supported by any pension fund but resting merely upon the certainty that the company would find every year the necessary funds wherewith to pay the pension out of its resources, in favour of former servants after they had left the company's service. There was no indefeasible right on the part of the pensioners to receive such pensions. They were described as being payable at the discretion of the company, but I think it must be taken that they always would be paid except for some very good reason. On the other hand, I do not think one can look at the matter as being a case where the discretionary character of the allowance may be disregarded, because one can very well imagine there might be cases of such misconduct as regards the company of a former servant that would clearly entitle the company from every point of view to say that it was impossible to pay that man a pension any longer, seeing the way he was behaving. I think, therefore, that one must not overlook the fact that the pension is a discretionary payment.

Now, that being the state of affairs, the company goes to an insurance company, and for a lump sum down they obtain a policy which gives to the company sums equivalent to the pensions paid by them to the former servants, for the term of the lives of those servants respectively. But, if the pensions were not paid by the company to the pensioners, undoubtedly the company would be entitled to receive the money payable under the policy from the insurance company and keep it. The pensioners are not parties to this arrangement. The liability of the company, in the sense that I have described, to the pensioners, the recurring liability to the pensioners, is not got rid of in the sense that the company have not to pay the pensions any more, but the expense of the pensions is countervailed in the accounts of the company by the money which they receive from the insurance company under the policy. It is not, of course, in point of law, a mere distinction in point of form, though as a matter of business, if all goes well, it comes to very much the same thing. If the insurance company ceased to pay the annuities under the policy, the pensioners would not lose their rights; if the appellant company does not pay the pensions the pensioners have no right of recourse against the insurance company. That is the position. There is this very material circumstance to be added, that not only have the pensioners no right under the policy, but the company have a very material right, because in certain events, which it is not necessary to particularize, the company could, without consulting the pensioners at all, revoke the policy and get its money back and give up this policy.

Now, with regard to the authorities, I think the position may be roughly, but sufficiently accurately for the present purpose, stated as follows: If any one gets rid by a lump payment of what will be an annual expense of his business he may bring in that lump sum payment as a disbursement on account of revenue. The high-water mark has, I think, been reached in *Hancock's* case. (1) That case has undoubtedly been approved, but it has been said by many judges of higher Courts than this that it is a case which was decided upon its own facts. Its own facts really are that by a payment to an insurance company the company got rid of a liability to pay a pension to a past servant; in that case the past servant took the policy instead of the pension. It seems to me that this case is very much on the line, but here the liability of the appellant company to pay these annual sums by way of pensions has not been got rid of, and, I think, if one looks at it accurately, one must come to the conclusion

(1) [1919] 1 K. B. 25; 7 Tax Cas. 358.

that here the company have got an asset. It is true that they have got an asset which would give them, in all probability, nothing on balance, because they use it to pay these pensions; but they have got an asset; they had not any pension fund to pay these pensions with, and now they have got a policy from an insurance company which will in the future not extinguish the liability but countervail it, and they have command of this policy to the extent that they are entitled to get their capital money—I say "capital money" without prejudice—back from the insurance company on surrendering the policies. It seems to me that that makes the distinction in this case, and that I cannot disturb the findings of the Commissioners.

Appeal dismissed.

Solicitors for appellants: *Johnson, Weatherall, Sturt & Hardy.*

Solicitor for respondents: *Solicitor of Inland Revenue.*

R. F. S.

CHINA NAVIGATION COMPANY, LIMITED *v.* ATTORNEY-GENERAL.

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Jan. 12, 13,
14, 15, 18;
March 17, 18;
April 11.

[1930. C. 2497.]

Crown—Army—British Shipowners requesting Services of Soldiers for Protection of Ships against internal Piracy—Right of Crown to require Payment.

There is no legal duty on the Crown to afford by its military forces protection to British subjects in foreign parts. If, in the exercise of its discretion, the Crown decides to afford such protection, it may lawfully stipulate that it will do so only on the condition that the cost shall be borne by those asking for it.

When Parliament has by the Army (Annual) Act sanctioned the raising and keeping of the army for one year, the right of the Crown in time of peace as to the disposition and use of the forces so raised is a prerogative right the exercise of which cannot be controlled by the Courts.

The plaintiffs, an English shipping company trading in the China seas, requested the Crown to provide armed guards to be placed on board their ships as a protection against internal piracy, which was a serious menace at the material time. Armed guards having been provided on the terms that they should be paid for by the plaintiffs, the latter claimed a declaration that as British subjects they were entitled to protection without payment:—

Held, that there was no duty on the Crown to afford military protection to the plaintiffs in foreign parts, and that if it did afford protection it was entitled to do so on such terms as it thought fit.

Decision of Rowlatt J. affirmed.

Appeal from a decision of Rowlatt J.

The plaintiffs were a shipping company trading particularly in Chinese and neighbouring waters, where their ships carried in every year a large quantity of valuable cargo and numerous passengers. At all material times the Chinese and neighbouring waters were infested by pirates, who frequently attacked ships trading in those waters, both from within and without the ships, the attacks from within being by evil-disposed persons who came on board ostensibly as ordinary and peaceable passengers, and who on opportunity arising overpowered the officers and crew and took possession of the ship and all valuables therein. Some protection in the shape of armed guards carried on the ships was for a time provided by the Crown, but in 1928 the shipowners, including the plaintiffs, were notified by the Crown authorities that, as the defence of a ship against piratical attack from within was essentially a matter for the owners themselves to deal with, naval or military guards would be supplied for a limited period only, during which the shipowners would not be called upon to pay the whole cost of the armed guard so provided, but that at the end of that period the full cost would have to be met by the shipowners. At a later date the Crown notified shipowners that the supply of armed guards would be discontinued after March 31, 1930, as the Crown had decided that the shipowners must assume full responsibility for the protection and preservation of the lives of passengers and crew and of their ships and cargoes against internal piracy as from that date. The plaintiffs and other shipowners protested, and requested the Crown to reconsider this decision and to continue the supply of armed guards. To that request the Crown authorities replied that the supply of armed guards would not be continued after March 31, 1930, except for a definitely limited period and on the condition (inter alia) that the guards should be paid for in full by the shipping companies. The plaintiffs again protested, but without effect, and accordingly the guards were provided for the plaintiffs' ships, but the plaintiffs had to pay the cost thereof. While not disputing the executive discretion of the Crown in discharge of its duties towards its subjects in connection with the prevention of, and protection against, piracy in Chinese waters, to decide what measures should be taken for the purpose, the plaintiffs contended that the Crown was not entitled, without the sanction of Parliament, to demand payment of the cost of such measures, and that they (the plaintiffs) were under no obligation to make the payments. The plaintiffs, contending that the payments were illegally exacted, as being moneys levied for the use of the Crown without statutory or other authority, accordingly brought the present action claiming; (*a*) a declaration that the stipulations for the provision of protection against, and for the prevention of, piracy imposed by the Crown were illegal and unenforceable against the plaintiffs and void;

(*b*) a declaration that the plaintiffs were under no obligation to make any of the payments to or for the use of the Crown for which the said stipulations provided; (*c*) a declaration that the plaintiffs had been and were under no obligation to make any payment to or for the use of the Crown in respect of the protection afforded by the Crown to ships and the lives and property thereon against the dangers of piracy in the waters aforesaid; (*d*) a declaration that, in existing conditions and so long as and whenever in the view of the Crown protection against pirates was required, the plaintiffs were entitled to enjoy the same without making any specific payments therefor.

By his defence the Attorney-General said that His Majesty was under no duty to provide armed guards or to use his naval or military forces for the purpose of preventing the outbreak of internal piracy on British ships. For some time till March, 1930, certain armed guards had been in fact provided upon the request of the shipping companies, but this was done not in pursuance of any duty in that behalf. Since March 31, 1930, armed guards had been provided upon the terms that the whole cost should be borne by the shipping companies, His Majesty being under no duty to provide them, and the shipping companies, including the plaintiffs, being under no obligation to employ the said guards, and by employing those guards the plaintiffs expressly or impliedly agreed to the terms upon which the services of the guards were offered. If, however, it was the duty of His Majesty to take measures to prevent the outbreak of internal piracy, the measures to be taken were within the discretion of His Majesty.

Rowlatt J. held that the action was misconceived, as, in his opinion, the Crown was entitled to require payment for providing armed guards on the plaintiffs' ships. He accordingly dismissed the action.

During the hearing of the appeal, the Court requested to be supplied with information regarding cases in which the Crown had received payment for the use or sale of Crown materials, or for the services of members of the national forces, and under what authority and how the sums so received were dealt with in the national accounts. In response to that request memoranda were furnished as to the navy and army respectively. The memorandum furnished on behalf of the navy showed that in a large number of cases charges were made for services rendered to private individuals, Dominion and foreign Governments, those charges being made without, as far as the Department was aware, any express statutory authority. The services in question included the loan of divers and diving apparatus for the repair of merchant vessels; the sale of old stores; the supply of naval ratings in the absence of regular workers on railways, etc.; the loan of officers and men to foreign Governments, the chartering of Admiralty oil tankers to private firms, and in respect of salvage services.

The statement prepared on behalf of the War Department gave particulars of occasions when or upon which the Department, without authority based on statute, received payment in respect of services rendered. Those included payment for work by the Ordnance Factory and payments for troops stationed in India, the Colonies, and Egypt; payments for military protection afforded to Malta, the Ionian Islands, and Ceylon; payments for services of dock battalions, for soldiers employed in harvesting work during the War, payments for employment of the military as technical workers during the general strike of 1926, for services of military fire brigades, for regimental bands, etc.

From a statement prepared on behalf of the Treasury on Exchequer Account and Appropriations in Aid it appeared that where a Department expects receipts incidental to the ordinary course of its business—for example, fees, proceeds of sale of old stores, or payments by other bodies for services rendered departmentally—the Treasury, acting under the Public Accounts and Charges Act, 1891, allows Departments, instead of paying such receipts into the Exchequer, to use them to defray the expenditure of the year so far as they suffice to meet it; this exception to the rule that receipts should be paid into the Exchequer being fully covered each year by the wording of the Appropriation Act which provides for the use by the Department administering the vote not only of the actual net sum granted by Parliament as an appropriation, but also for the use by that Department of all sums received during the year within a specified total. If, for example, an estimate is presented to Parliament showing that a given Department requires to spend, say, 11,000*l.* gross during the course of the year, but that receipts from fees, sales of stores, etc., are likely to realize 1000*l.*, Parliament is asked to grant 10,000*l.* to the Department by means of a vote together with authority to use in addition the 1000*l.* forthcoming from fees, etc. The Department is rigidly limited to an expenditure not exceeding 11,000*l.* gross and not exceeding 10,000*l.* net. Officers of the Comptroller and Auditor-General's Department have access to the War Office accounts and papers for the purpose of satisfying themselves of the regularity and correctness of all transactions relating to the accounts, and if service had been wrongly given, or for which inadequate authority existed, or for which inadequate or improper payment was made, the matter would be brought to the notice of the Comptroller and Auditor-General.

The appellants prepared and put in an historical memorandum as to the position of the Crown in relation to the land forces by way of reply to the foregoing memoranda furnished by the Treasury Solicitor. The memorandum traced the history of the armed forces during three periods: (1.) from the Conquest to the accession of Charles I.; (2.) from the latter date to the end of 1689; and (3.) from 1689 to the present day. During the first period, it was pointed out, that as to the feudal levy the King was able to call upon it, but that his control over it was severely circumscribed; while as to the national levy or militia array, it had its common law origin in a pre-Norman organization, and after the Conquest it was developed by statute. As to the forces known as trained bands they were at first tolerated, provided the King paid for the troops he raised, and later, when Edward II. began a practice of casting the burden of payment on the counties in which the men were impressed, a series of statutes condemned the practice: see 1 Edw. 3, stat. 2, c. 5; 25 Edw. 3, c. 8. During the second period—from the accession of Charles I. to the end of 1689—it was submitted that the King had such control as is implied by the term prerogative only over volunteers serving the King and paid for by him, and that the recital in the Impressment Act, 1642, recognized the feudal levy and the militia as the only two constitutional land forces, except in case of invasion. At the Restoration, Parliament settled the problem of the military forces of the kingdom by passing three statutes: 12 Car. 2, c. 15, entitled, "An Act for the speedy disbandment of the army and garrisons of this kingdom"; 12 Car. 2, c. 24, which abolished the military tenures and the feudal levy; and 13 Car. 2, c. 6, which declared "the sole supreme government, command and disposition of the militia, and of all forces by sea and land, ... is, and by the laws of England ever was, the undoubted right of his Majesty, and his Royal predecessors, Kings and Queens of England." It was submitted that the Restoration settlement amounted to an abandonment by the King of any claim to maintain an army, a recognition by Parliament that the sole supreme government of all such forces as could be lawfully maintained was the right of the King, and that at that time the only force left permanently available was the militia, which was merely the national levy under a changed name. In 1689 the Convention Parliament passed the Bill of Rights and the Mutiny Act, and it was submitted that Parliament, with full knowledge of history, then repeated the denial of any prerogative power to maintain an army in time of peace, and that, in passing the Mutiny Act, Parliament was deliberately conferring on the Crown new powers not enjoyed in virtue of the prerogative. During the third period—from 1689 to the present day—it was submitted that Parliamentary control grew with army organization and development, and that the real importance of the Articles of War with regard to the prerogative was that they consisted of a delegation of powers from Parliament. Referring to these Maitland, in his Constitutional History of

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England, p. 449, said: "If you wish for an example . . . . of delegated legislative powers I know of no better than this—for the Queen is empowered to legislate for the better government of officers and soldiers and she can create new offences," and again (p. 453): "Now under the Acts of Parliament, and within the limits which they set, the command, government, disposition of the army is in the Queen." From this historical survey it was submitted that the Crown in its use of the army had no prerogative on which to fall back.

The plaintiffs appealed. The appeal was heard on January 12, 13, 14, 15, 18; March 17, 18.

Sir Leslie Scott K.C. and *Valentine Holmes* for the appellants. Pirates are "enemies" within the Naval Discipline Act, 1866—see s. 49—and within the Army Act, 1881—see s. 190, sub-s. 20—and the kind of acts that took place, and against which protection was asked for in this case, has been held to be piracy jure gentium: *Attorney-General for Hong Kong* v. *Kwok-a-Sing*. (1) As British subjects the appellants were entitled to the protection of the Crown against those piratical acts without payment, inasmuch as all expense incurred by the army in putting down or preventing piracy is covered by the House of Commons' votes for the army to which as taxpayers the appellants contribute.

[Scrutton L.J. Is there any duty on the Crown to supply guards on British ships trading in the Yangtze or Chinese waters generally?]

Yes, although not in the sense that the Court could issue a mandamus for its enforcement, the duty being, as was said by Brett L.J. in *Attorney-General* v. *Tomline* (2), one of imperfect obligation. When the Crown in the exercise of its discretion affords protection by its armed forces, it has no legal right to demand payment therefor, seeing that it is under a duty to give the protection. In *Attorney-General* v. *Wilts United Dairies* (3) the House of Lords held that when statutory authority is given to the executive Government to make

(1) (1873) L. R. 5 P. C. 179.
(2) (1880) 14 Ch. D. 58, 66.
(3) (1922) 91 L. J. (K. B.) 897.

regulations controlling acts to be done by His Majesty's subjects, a Minister cannot, without the express authority of Parliament, demand payment for exercising his power of control in a particular way, notwithstanding that the money demanded was to be applied to a public purpose. The same principle was laid down earlier in *Wathen* v. *Sandys.* (1) There it was held that the sheriff was not entitled to charge the candidate at a Parliamentary election with any part of the expense necessarily incurred in executing the writ. The sheriff having sought to recover (inter alia) the cost of providing constables to guard the booths, Lawrence J. said: "The sheriff is bound to preserve the peace of the county. If he is put to any extraordinary expense in this way, let him represent the matter when he passes his accounts in the Exchequer, or directly to His Majesty's Government." Similarly in *Morgan* v. *Palmer* (2) it was held that the Mayor of Great Yarmouth could not demand a fee for the grant of a licence to a publican. Again, in *Brocklebank, Ld.* v. *The King* (3), the Shipping Controller was held not entitled to require, as a condition of a licence to the suppliants to sell one of their ships to a foreign firm, the payment of a percentage of the purchase money to the Ministry of Shipping. Between these cases and the present there is no distinction in principle; in each the absence of statutory authority to demand the payments was held to invalidate the claim. In the Army Acts there is nothing comparable to those provisions in the Police Acts which the House of Lords held in *Glasbrook Bros., Ld.* v. *Glamorgan County Council* (4) entitled the police to demand payment for special services rendered by them. The views expressed in the dissenting judgment of Atkin L.J. in the same case in the Court of Appeal (5), although held by the House of Lords to be inapplicable with regard to services rendered by the police outside the scope of their ordinary duties, are clearly in point in the present case. He there said (6): "The police then are subject to a public duty to preserve the peace, to protect the inhabitants and to safeguard property. Can they for their services make a money charge to the individual whose life or property is protected in pursuance of that duty ? It appears to me that at common law it would be plainly contrary to law to charge for the performance of a public duty, and that the onus is on the person entrusted with the duty to establish some exception to the general rule, either by statute or otherwise, validating such a power." Here the Crown can point to no statute validating the demand for payment made to the appellants.

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(1) (1811) 2 Camp. 640.
(2) (1824) 2 B. & C. 729.
(3) [1925] 1 K. B. 52.
(4) [1925] A. C. 270.
(5) [1924] 1 K. B. 879, 893.
(6) [1924] 1 K. B. 897.

[SCRUTTON L.J. Has the Crown any duty to protect British subjects in foreign countries ?]

A British subject who is on the high sea is not in a foreign country. A British ship is a part of British territory ; as Blackburn J. said, in *Reg.* v. *Anderson* (1), "a ship, which bears a nation's flag, is to be treated as a part of the territory of that nation. A ship is a kind of floating island." Allegiance and protection are complementary terms : *Calvin's Case.* (2) That applies absolutely, although, of course, a subject may by his own act put himself in a particular place where it is impossible for the Crown to afford protection ; in such a case the subject has relieved the Crown from the obligation to afford protection. In *Reg.* v. *Keyn* (3) Bramwell J.A. said : "As a rule, where the sovereign has jurisdiction there is allegiance, permanent, as subject or citizen, or temporary, as being within the territory. In such case there is a corresponding duty of protection." Again, Cockburn C.J. in the same case said (4) : "According to the doctrine of Lord Coke in *Calvin's Case* (2) protection and allegiance are correlative" ; see also the recognition of *Calvin's Case* (2) by Farwell J. in *In re Johnson* (5), and per Lord Sterndale M.R. in *Markwald* v. *Attorney-General.* (6)

[They also referred to Dicey's Law of the Constitution, 8th ed., pp. 512 et seq., as to soldiers called upon to disperse an unlawful assembly.]

(1) (1868) L. R. 1 C. C. 161, 163.
(2) (1608) 7 Rep. 1*a*.
(3) (1876) 2 Ex. D. 63, 150.
(4) 2 Ex. D. 236.
(5) [1903] 1 Ch. 821, 833.
(6) [1920] 1 Ch. 348, 364.

Sir Thomas Inskip A.-G., *Sir William Jowitt K.C.*, the *Hon. S. O. Henn Collins K.C.*, and *Wilfrid Lewis* for the respondent. The extent of the Crown's duty to give protection by its armed forces is not a matter which can be inquired into by the Court. It is for the Crown in the exercise of its prerogative to say whether, in what circumstances, and under what conditions, it will grant protection. The Food Controller, who was held in *Attorney-General* v. *Wilts United Dairies* (1) disentitled to make a money demand in return for a licence, was the creature of statute; so too is the police authority; but the King is in a totally different position in relation to the army. In early days the army was in fact the servant of the King, and was paid for by him out of the revenues of the Crown. After the Restoration a standing army was established, and by the preamble of the statute 13 Car. 2, st. 1, c. 6, it was recited that "within all his Majesty's realms and dominions, the sole supreme government, command and disposition of the militia, and of all forces by sea and land, and of all forts and places of strength, is, and by the laws of England ever was, the undoubted right of his Majesty, and his Royal predecessors, Kings and Queens of England." That preamble has never been repealed. The provision in the Bill of Rights that "the raising or keeping a standing army within the kingdom in time of peace unless it be with consent of Parliament is against law," recognizes that the keeping of a standing army was a matter for the Crown, although thenceforth it was to be with the consent of Parliament. Once the army has been raised, its supreme control is in the Crown. This was clearly recognized in *Macdonald* v. *Steele* (2), where Lord Kenyon said that "His Majesty's pleasure supersedes all enquiry, as he has the absolute direction and command of the army." That accurately states the position in law: that is, the King, by virtue of his prerogative, can decide how the armed forces are to be disposed of. In *Attorney-General* v. *De Keyser's Royal Hotel* (3), Lord Dunedin approved the definition of prerogative given by a learned constitutional writer, where he said that it was "the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown." In Chitty's Prerogatives of the Crown it is said (p. 44) that "as the constitution of the country has vested in the King the right to make war or peace, it has necessarily and incidentally assigned to him on the same principles the management of the war; together with various prerogatives which may enable His Majesty to carry it on with effect. Thus the King is at the head of his army and navy, is alone entitled to order their movements, to regulate their internal arrangements, and to diminish, or, during war, increase their numbers, as may seem to His Majesty most consistent with political propriety." As is borne out by the memorandum submitted by the War Office, the Crown has time and again lent troops to other parts of the Empire and to foreign countries for reward, and the payments so made are duly taken into account in the estimates submitted to the House of Commons. Also, both army and navy stores have been sold from time to time. For the latter there may be no direct statutory authority, but there is clear statutory recognition of the practice: see War Department Stores Act, 1867 (30 & 31 Vict. c. 128), s. 20, and Admiralty Suits Act, 1868 (31 & 32 Vict. c. 78), s. 3. After the Great War millions of stores were sold, not under the provisions of any statute, but under the prerogative powers still remaining in the King.

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(1) 91 L. J. (K. B.) 897.

(2) (1793) Peake, 175.

(3) [1920] A. C. 508, 526.

[Slesser L.J. Has not the Army Act been constituted an exhaustive code for dealing with the army, and if that is so, and no power is there expressly given to hire out troops, is there any power to do so?]

The number of men constituting the army is controlled by the Act. The Act also deals with the discipline of the army, but does not touch the prerogative of the King to dispose of the troops. In no way does the Act displace that prerogative: see Clode's Military Forces of the Crown, vol. ii., p. 332. As to the navy, the Crown, through the Admiralty, before the Merchant Shipping Acts used to claim, and in fact received, payment for the use of His Majesty's ships in salvage operations: see *The Mary Ann* (1); *The Thetis* (2); *The Lustre* (3); *The Ewell Grove*. (4) Then came the Merchant Shipping Acts of 1854 and 1894, which provided that no claim for salvage services rendered by His Majesty's ships could be made except with the consent of the Admiralty. If in any case where payment has been received for services rendered by the armed forces of the Crown there has been a breach of duty, it has been a breach of constitutional duty for which the only remedy must be sought in Parliament.

Sir Leslie Scott K.C. in reply. The argument for the Crown and the memoranda prepared by the Government Departments merely beg the question. No attempt has been made to show any legal grounds from which it can be inferred that the Crown's prerogative still exists. Reliance has been placed for the respondent on the preamble to 13 Car. 2, c. 6, but the words there used must be confined to forces existing at the time of the passing of the Act. Evidence concerning the navy is irrelevant to questions relating to the army; and acts of the executive in time of war are no evidence of the powers of the Crown in time of peace. The navy existed for many years before the army came into being. The army owes its existence to the Mutiny Act, 1688, and unless powers claimed by the army can be found in some statute they cannot be justified. The army exists for the safety of the United Kingdom and the defence of the possessions of His Majesty's crown: see the preamble to the Army Act, 1881; and it is paid for by Parliament. Those two facts exclude the suggestion that the King has power to let the army out for reward. After 1689 the army became a purely statutory body: see Chitty's Prerogatives of the Crown, p. 46; see also per Lord Loughborough C.J. in *Grant* v. *Gould* (5), where he speaks of "the army being established by the authority of the Legislature"; see further per Blackburn J. in his charge to the grand jury in *Reg.* v. *Eyre* (6); he there expresses the view that the prerogative of the Crown over the army exists in time of war only. Clode in his work, Military Forces of the Crown, speaks of the prerogative as still in existence, but Clode is not a legal authority, and where he deals with the prerogative he is often wrong. As to the statement that payments for the use of troops have been made by various colonies, it is to be borne in mind that arrangements between different parts of the Empire on such matters are not contracts. In the case of India the matter is governed by statute; while as to payments by the Egyptian Government, the position was analogous to demanding contributions from a conquered country.

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(1) (1823) 1 Hagg. Adm. 158.
(2) (1833) 3 Hagg. Adm. 14, 61.
(3) (1834) 3 Hagg. Adm. 154.
(4) (1835) 3 Hagg. Adm. 209, 224.
(5) (1792) 2 H. Bl. 69, 99.
(6) (1868) Report of *Reg.* v. *Eyre*, 1868, p. 70.

[He referred to Manual of Military Law, chapter 2, paras. 17 et seq.]

Sir William Jowitt K.C. referred to the terms of the letters patent constituting the Army Council.

Cur. adv. vult.

1932. April 11. The following judgments were read:—

SCRUTTON L.J. An English shipping company carrying passengers and goods on the coast of China desires protection from the British military forces against what may be called "internal piracy." It receives for payment large numbers of Chinese passengers. Some of them coming on board under pretence of being passengers, but with the intent of robbery, during the voyage attack and overpower the ship's officers and rob the ship. Various means have been suggested for meeting this danger. For some time under Hong Kong Ordinances the local police supplied Indian guards for which the shipowners paid; but the shipowners came to the conclusion that such guards were inefficient. The British authorities suggested convoy by naval forces, but the owners of fast ships objected that their operations were handicapped by the slow pace of the convoy of inefficient ships. The local authorities favoured a grille system, which might enable armed officers to defend themselves in a kind of fortress till assistance arrived; but the shipowners argued that the grille, if strictly worked, interfered with the working of the ship, and if worked with less rigid precautions was of no use. The system then tried was to put a small military guard of British soldiers in each ship; but the British forces in the locality were not numerous enough to supply a guard for each ship. Some 200 British ships were concerned, and the appellants calculated that they alone wanted 200 men. At first the British authorities provided such soldiers as they did provide free, though in some cases the shipowners furnished the food. Ultimately, after the highest authorities had been consulted, by a letter of March 18, 1930, the shipowners were informed that regular guards would only be supplied if paid for by the shipping companies in full. By a letter of March 26, 1930, the shipowners said they must under the circumstances accept guards from His Majesty's forces to be paid for in full, but did so under protest. The Government required the companies before guards were supplied to give a written assurance of agreement to the conditions as to cost and liability on the terms of a document of March 28, 1930, and payments were made accompanied by letters similar to that of June 19, 1930.

The shipowners now bring, not a petition of right to recover the money paid as paid under illegal duress, but an action against the Attorney-General for four declarations alleging in substance that the Crown has no authority to demand money for providing protection against piracy, the shipowners being entitled to require the Crown to provide the necessary protection without payment. Rowlatt J. decided in favour of the Crown, and the shipowners appeal.

The argument before this Court took rather a different course from that before the judge below. As I understand, the argument below was mainly that the Crown was under a duty to supply protection and could not demand money payments for performing their duty. The argument begins with the very general statement in *Calvin's Case* (1): "For as the subject oweth to the King his true and faithful ligeance and obedience, so the Sovereign is to govern and protect his subjects," which in turn is founded on a passage in Glanville as to the relation between the landlord and his tenant by homage. Henry II. would, I think, have been surprised to hear that if his tenant went to China the King was bound to follow and protect him. The argument then relied on the authorities cited by Atkin L.J. in his dissentient judgment in *Glamorgan County Council* v. *Glasbrook Bros., Ld.* (1), such as *Dew* v. *Parsons* (2); *Morgan* v. *Palmer* (3); and *Steele* v. *Williams* (4), where public officials have demanded fees not authorized by Parliament for performing their duty. The argument also relied on the post-War cases in which controllers who had the duty to grant licences affixed to them conditions of payment not authorized in the statutes appointing them: see *Attorney-General* v. *Wilts United Dairies* (5) as to the Food Controller; the case of the Shipping Controller, *Brocklebank, Ld.* v. *The King* (6); and also *Southwark Borough Council* v. *Partington Advertising Co.* (7) Rowlatt J. distinguished these cases as relating to persons who had a duty legally enforceable, whereas there was no duty legally enforceable against the Crown to afford protection, especially in foreign countries. Indeed, counsel for the shipowners agreed that the Courts could not control or review the discretion of the executive as to the method in which the Crown should afford protection, if any, but argued that, if the Crown did afford protection, it must be because it was necessary, and for necessary protection no payment could be required.

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(1) 7 Rep. 1*a*, 4*b*.

I entirely agree with the view of Rowlatt J. that there is no legal duty on the Crown to afford military protection to British subjects in foreign parts. A missionary, in self-sacrificing devotion to his religious views, goes without the consent of the Crown into savage countries inhabited by tribes who strongly object to the missionary denouncing their religion. Has the Crown any duty to follow and protect the missionary and send armed forces to rescue him from his self-imposed danger? A shipowner, without the assent of the Crown, trades for purposes of his own profit in neighbourhoods inefficiently policed by foreign Governments; for his profit he takes on board large numbers of foreign passengers going on the high seas, or up a navigable river to a foreign port. He is unable to control these foreign passengers or guarantee their peaceful intentions. Has the Crown a legal duty to protect the shipowner against the criminal action of the passengers whom the shipowner himself has invited aboard? It is said on the one hand that a British ship on the high seas, or on the Yangtze, is British territory, and that the Crown must protect British subjects in British territory; on the other hand, that the protection asked is against anticipated danger which may never occur and which results from the act of the shipowner himself in taking evil-disposed passengers on board, and not to protect against actual danger in existence.

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(1) [1924] 1 K. B. 879.

(2) (1819) 2 B. & Ald. 562.

(3) 2 B. & C. 729.

(4) (1853) 8 Ex. 625.

(5) 91 L. J. (K. B.) 897.

(6) [1925] 1 K. B. 52.

(7) (1905) 3 L. G. R. 505.

Counsel for the shipowners used the same dilemma which Atkin L.J. unsuccessfully used in *Glamorgan County Council* v. *Glasbrook Bros., Ld.* (1) He says: "If the request [for special protection] is one which is improper, they should not comply with it. If they do comply with it, they adopt it as a proper means, though possibly not the best means, of performing their duty." The majority of the House of Lords objected to being impaled on this dilemma. Lord Cave, after reading the dilemma, said (2): "With great respect to the learned Lord Justice I am disposed to think that this reasoning rests on an ambiguous use of the word 'duty.' There may be services rendered by the police which, although not within the scope of their absolute obligations to the public, may yet fall within their powers, and in such cases public policy does not forbid their performance." Lord Finlay, after again citing the passage of Atkin L.J., says (3): "I think that this argument, like most arguments put in the form of a dilemma, fails to cover the whole ground. There was no duty on the police to give the special protection asked for, but it does not follow that it was their duty not to give it." In the same way the King, as head of the army, may think this a way of affording protection, which in view of other calls on the army, he is not able to afford except on the terms that those who ask this special and extravagant form of protection for enterprises which they themselves have selected without any authority from the King, shall pay for the protection they want for the dangerous enterprises they themselves have chosen to enter upon for their private profit. Because every jeweller who leaves valuable jewellery at night only protected by a plate-glass window against smash-and-grab raids is in danger of robbery, are the police bound to keep a policeman outside every jeweller's shop, or can they say: "If you want this kind of individual protection, you, the individual, must pay for it"? Because every owner of a motor-car who uses the street as a garage and leaves his car unprotected runs the risk of losing it, are the police under a legal duty to keep a policeman in charge of every car which the owner has left in self-created danger, or may the police authorities say that if this kind of special protection is wanted and can be afforded, the individual must pay for it? The House of Lords accepted the second alternative in *Glasbrook's* case. (1)

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(1) [1924] 1 K. B. 879, 899.
(2) [1925] A. C. 279.
(3) [1925] A. C. 287.

In my opinion there is no legally enforceable duty to protect British property from danger in foreign parts. The remedy, if any, is pressure brought by Parliament on Ministers to take steps either by diplomatic action or otherwise to protect British subjects. Britons fortunately are enterprising people accustomed to look after themselves; to suggest a duty on the British Government to follow adventurous Britons all over the world into places where their personal wishes or adventures have taken them to protect them from the difficulties they have got themselves into, does not represent a legal duty of any kind.

Before this Court, while the question of duty to protect as correlative with allegiance was argued, more stress was laid on the argument that the Crown had no authority to demand payment for the use of its armed forces. Rowlatt J. did not deal with this argument, but treated what he called "using the forces for reward" as a matter to which no objection could be taken. The important question was thus raised in this Court as to the exact powers of the King as head of the army, whether His Majesty by his prerogative could regulate the army as he pleased, so far as he was not expressly restrained by the Army Act, or the financial provisions of the Appropriation Act, or whether the position was not that the King as head of the army could only incur such expense and take such action as was authorized by statute, and especially could not demand money for protection afforded by his armed forces, which was said to be imposing a charge on the subject without the authority of Parliament. But if there was no duty to afford anticipatory protection in foreign parts, no charge was imposed on the subject, because he was not bound to accept the protection, and need not pay money unless he asked for protection, which the Crown was under no duty to afford him. I am reluctant to discuss the matter under the head of "Prerogative," because, as Professor Dicey said, the word introduces the political controversies of an earlier age as to the existence of a royal sovereign power which could not be superseded, regulated, or abolished by Act of Parliament. Professor Dicey, in his Law of the Constitution, 8th ed., p. 421, treats the prerogative as "the name for the residue of discretionary power left at any moment in the hands of the Crown, whether such power be in fact exercised by the King himself or by his Ministers. Every act which the executive government can lawfully do without the authority of the Act of Parliament is done in virtue of this prerogative." (1) Now it is clear that there is a wide margin of executive acts done by the King or his Ministers in relation to the administration of the army, which the Courts of law will not interfere with or control. The Statute Law Revision Act, 1863 (26 & 27 Vict. c. 125), left unrepealed that part of the preamble of the Act of 1661, which recited that "within all His Majesty's realms and dominions, the sole supreme government, command, and disposition of the militia and of all forces by sea and land, and of all forts and places of strength, is, and by the laws of England ever was, the undoubted right of His Majesty, and his Royal predecessors, Kings and Queens of England; and that both, or either of the Houses of Parliament cannot, nor ought not to pretend to the same." Lord Haldane, in Halsbury's Laws of England, vol. xxv., p. 37, cited this preamble as the authority for his statement that "the government of the forces is vested in the Crown, who has power to make regulations as to command and administration." As Lord Kenyon said in *Macdonald* v. *Steele* (1), where an officer was asking the Paymaster-General for his half-pay, "His Majesty's pleasure supersedes all enquiry, as he has the absolute direction and command of the army." The Courts have repeatedly refused to intervene in questions of pay and service, though the Royal Warrants appear to entitle the claimant to what he asks the Court to give him. This is so, whether the claimant asks relief from the King or from the executive officer. Colonel Mitchell in *Reg.* v. *Secretary of State for War* (2), demanding half-pay under a warrant, failed against the Secretary of State for War on the ground that there was no obligation on the Secretary except to the Crown, and that there was "no obligation on the Crown to make this allowance recognised by the law." He also failed on petition of right against the Crown. (3) Lord Esher said (4): "An officer . . . . cannot as between himself and the Crown take proceedings in the courts of law in respect of anything which has happened between him and the Crown in consequence of his being a soldier. The courts of law have nothing whatever to do with such a matter." This is because the administration of the army is in the hands of the King, who unless expressly controlled by an Act of Parliament cannot be controlled by the Courts. Similar decisions are found in *Gidley* v. *Lord Palmerston* (1); *In re Tufnell* (2); *Dunn* v. *Reg.* (3), where it was held that a servant of the Crown, though expressly engaged for a fixed term of years, could be dismissed without notice at the pleasure of the Crown: *Kinloch* v. *Secretary of State for India* (4) and *Grant* v. *Secretary of State for India.* (5)

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(1) [1925] A. C. 270.

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(1) ['The King's prerogative, that is, the King's law': Selden, Table Talk, *s.v.*—F. P.]

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(1) (1793) Peake, 175.

(2) [1891] 2 Q. B. 326.

(3) [1896] 1 Q. B. 121*n*.

(4) Ibid. 123*n*.

The constitutional aspect of the financial side of the question was more fully explored in this Court than it had been below. The Court was anxious to ascertain exactly in what kind of cases the Crown received money for the sale or use of Crown materials, or the services of members of the national forces, and under what authority and how the sums so received were dealt with in the national accounts. In consequence the hearing was adjourned, and the Attorney-General supplied us with two detailed memoranda as to the navy and army respectively. Counsel for the appellants did not discuss in detail the navy papers, as he appeared to take the view that the prerogative of the Crown in respect of the navy was much wider than that, if any, in regard to the army, owing to the historical circumstances connected with the Revolution of 1689 and the Bill of Rights in connection with a "standing army."

In the case of the navy it was obvious that the Admiralty constantly received payments from outsiders, foreign Governments, or British and foreign subjects, for work done or services or materials supplied to those outsiders; and that the Admiralty so acted without any express authority from statutes, though the sums they received were dealt with in the Appropriation Act as stated hereafter. For instance, the Admiralty charter the navy oil tankers to private individuals for reward when they are not required for navy services, and there is no statute authorizing such action. The most interesting question is that of salvage. In *The Mary Ann* (6) Lord Stowell said: "Although there is an obligation upon King's ships to assist the merchant vessels of this country; yet, when services have been rendered, those who confer them are entitled to an adequate reward." That statement was limited in later years by the statutes requiring that no salvage reward should be claimed without permission of the Admiralty. It was also made more precise by the decision in *Cargo ex Ulysses* (1), where the Court said that it would not treat the presence of a King's ship protecting against actual pirates or robbers as salvage service, but did treat the presence of guards and sentinels not on the King's ship but on a wrecked ship to guard against pirates or robbers who might attack, and of members of the navy salving cargo from maritime perils, as entitling them to salvage reward. This was not the case of a claim for salvage service and remuneration under an agreement made, not when perils were actually endangering the ship, but in anticipation that such perils might arise. The question of King's ship salvage was not exhaustively discussed before us, but will be found so discussed in Kennedy on Civil Salvage, pp. 112–118. The Admiralty render services to private persons and companies in time of civil commotion for payment. A similar series of payments to the War Office for the supply of materials and men is set out in the army memorandum. None of these payments are required or protected by express statutory authority; all are said to be justified by the uncontrolled discretion of the King as head of the army, in matters under which he is under no express statutory restriction, such as the requirement that he shall not employ more men or spend more money than Parliament authorizes. He need not employ all these men or spend all the money that Parliament authorizes. The matter is left to the uncontrolled discretion which he exercises by his Ministers. The Courts cannot question it, though Parliament by vote of no confidence or pressure in Parliament may influence it.

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(1) (1822) 3 Brod. & B. 275.
(2) (1876) 3 Ch. D. 164, 176.
(3) [1896] 1 Q. B. 116.
(4) (1882) 7 App. Cas. 619.
(5) (1877) 2 C. P. D. 445.
(6) 1 Hagg. Adm. 158.

The financial side of the matter, the question of imposing a charge on subjects without the consent of Parliament, is illuminated by two memoranda from the Treasury produced to us during the second hearing. The first sets out the way in which receipts for services rendered by the army and navy have been dealt with during the last one hundred and twenty years. After much discussion, the system was put on a statutory footing by the Public Accounts and Charges Act, 1891 (54 & 55 Vict. c. 24). Sect. 2 deals with all such receipts as appropriations in aid, under the direction of the Treasury, of money provided by Parliament for any purpose, and as such they are so applied and audited and dealt with. The suggestion that such receipts are not authorized by Parliament disappears. The second memorandum shows in detail in the case of a payment by the present appellant company for services similar to those the subject of the present appeal, the progress of the particular payment through the various revenue authorities, till at last it is sanctioned as an appropriation in aid under the head "Miscellaneous Receipts" by the Appropriation Act for the year, and this is devoted to the relief of the sum voted by Parliament.

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(1) (1888) 13 P. D. 205.

I am therefore of opinion that the appeal fails on the following grounds: (1.) That there is no duty enforceable by the Courts on the Crown to render the services for which the appellants ask. The matter is one for the uncontrolled discretion of the King as head of the army, both as to whether he shall afford such protection against such anticipated, not actual danger, and as to the terms on which he should afford it; (2.) there is no compulsion on the appellants to make the payment of which they complain; but if they want the services they must pay for them if the King requires them so to pay; (3.) the payment, where made, is sanctioned and controlled by Parliament in the Appropriation Act under the system of appropriation in aid under the Act of 1891.

The appeal must be dismissed with costs.

LAWRENCE L.J. The plaintiff company is an English company incorporated under the Companies Acts and carries on an extensive shipping business in Chinese and neighbouring waters. These waters have for some considerable time past been infested by Chinese pirates, and frequent piratical attacks have been made on ships belonging to the plaintiff company and other owners both from without and within the ships. An important part of the plaintiff company's business consists of carrying Chinese passengers travelling from one port to another along the coast, and the plaintiff company and other owners have found it difficult to prevent pirates coming on board their ships in the guise of passengers and then overpowering the master and crew and taking forcible possession of the ship and her cargo.

Various expedients for preventing this form of piracy having been tried in vain, the plaintiff company and other owners (being unwilling to give up the Chinese passenger traffic, which constituted a valuable section of their trade) in the autumn of 1928 approached the military authorities in Hong Kong and London and urgently requested them to provide military guards to be carried on their ships. In response to such request the military authorities in the month of October, 1928, whilst maintaining that the defence of ships against internal piracy was essentially a matter for the owners to deal with, eventually agreed as a temporary emergency measure to provide armed guards on as many British ships carrying Chinese passengers as was reasonably practicable in view of the limited number of soldiers at their disposal on the China Station. In making this provision the authorities pointed out that these protective measures could not be continued indefinitely and that shipowners should themselves take adequate measures for internal defence. As about 200 British ships were engaged in the China trade and the plaintiff company alone would have required about 200 soldiers adequately to guard all their ships, it was obviously impracticable for the military authorities to provide armed guards for more than a small proportion of the total number of ships requiring them. At first no charge was made to the shipowners for providing these guards beyond the additional expenditure over and above the normal cost of the guards. Later on, in the month of December, 1928, the military authorities notified the shipowners that the provision of guards would be continued for a period of six months as from November 1 then last on the conditions then in force, but that if military guards were required after that date the full cost of providing them must be met by the shipping interests concerned.

Early in 1930 the military authorities, after informing the shipowners that it had been decided to reduce the strength of the British garrison in the China Command by one battalion from Hong Kong at the end of February, 1930, and that consequently it would be necessary to reduce considerably the number of military guards available in British ships, notified the shipowners that it was the declared policy of His Majesty's Government that all military guards should be withdrawn on April 1, 1930, and that consideration must be given by the shipowners to the steps they were prepared to take for providing guards from other sources.

The plaintiffs and other shipowners protested against this decision, and requested the authorities to reconsider it and to continue the supply of military guards after March 31, 1930. In the month of March, 1930, the Commander-in-Chief on the China Station notified the shipowners that in view of the fact that the shipping companies concerned were then engaged in working out details for the formation of a properly trained force for the prevention of piracy on their vessels His Majesty's Government had reconsidered its attitude to the extent that it had decided to sanction a further extension of the provision of military guards for a definitely limited period, subject (inter alia) to the condition that any guards supplied after March 31, 1930, must be paid for in full.

The plaintiffs and other shipowners at first protested against the condition of paying for the military guards in full, but ultimately submitted to that condition and agreed to pay, and, in fact, paid in full for all military guards supplied to them after March 31, 1930.

The plaintiff company, after having made that agreement, commenced this action against the Attorney-General, alleging that the agreement was made under compulsion, and asking the Court to declare that the condition imposed upon the plaintiff company by the Crown of paying for the military guards was illegal and unenforceable and that the plaintiff company was under no obligation to make any such payment.

The first ground on which the plaintiff company bases its claim is that the Crown has provided the military guards in fulfilment of the common law duty which it owes to its subjects, and that in the absence of express statutory sanction it is not entitled to demand any payment as a condition of fulfilling that duty. Sir Leslie Scott's contention on this branch of the case was that the King, both as liege lord and as defender of the realm, was by the common law under a duty to protect the lives and property of his subjects, and to defend his realm and every part of it (including British ships wheresoever they might happen to be) against attacks by enemies.

In support of the proposition that the King owed such a duty as liege lord the following authorities were cited (1 Blackstone, Comm. 366): " Allegiance is the tie, or *ligamen* which binds the subject to the king, in return for that protection which the king affords the subject"; *Calvin's Case* (1): "Ligeance is the mutual bond and obligation between the King and his subjects, whereby subjects are called his liege subjects, because they are bound to obey and serve him; and he is called their liege lord, because he should maintain and defend them"; and *Reg.* v. *Keyn* (2): "According to the doctrine of Lord Coke in *Calvin's Case* (3) protection and allegiance are correlative." Counsel also referred to *In re Johnson* (4) and *Markwald* v. *Attorney-General.* (5)

In support of the proposition that by the common law the King owed a duty to the plaintiff company to defend its ships against internal piracy, Sir Leslie Scott cited the following authorities: *Attorney-General* v. *Tomline* (6), a case dealing with the King's duty to defend the realm from the encroachments of the sea, where Brett L.J. used these words: "It is said by Lord Coke, who is a great authority, in the case of the *Isle of Ely* (1), that by the common law 'the King ought of right to save and defend his realm as well against the sea as against the enemies that it should not be drowned or wasted'; that is to say, there is a duty on the King, by reason of his being King, to defend his realm, and therefore of course all his realm and every part of his realm"; *Reg.* v. *Anderson* (2): "It has been decided that a ship, which bears a nation's flag, is to be treated as a part of the territory of that nation. A ship is a kind of floating island"; Hawkins' Pleas of the Crown, 8th ed., vol. i., p. 251: "A pirate is one who, to enrich himself, either by surprise or open force, sets upon merchants or others trading by sea, to spoil them of their goods or treasure; and he is called hostis humani generis"; Army Act, 1881, s. 190, sub-s. 20: "The expression 'enemy' includes all armed mutineers, armed rebels, armed rioters, and pirates"; *Attorney-General for Hong Kong* v. *Kwok-a-Sing* (3), where it was held that passengers as well as mariners who violently dispossess the master and carry away the ship or any part of the cargo are pirates. It is contended that these authorities support the proposition that as by the common law it is the duty of the King to defend every part of his realm against enemies, and as every ship belonging to the plaintiff company (being part of the territory of England) is a part of the King's realm, and as all pirates are enemies, so the King ought of right to defend the plaintiff company's ships against piratical attacks by the passengers carried in those ships.

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(1) 7 Rep. 5*a*.
(2) 2 Ex. D. 63, 236.
(3) 7 Rep. 1*a*.
(4) [1903] 1 Ch. 821.
(5) [1920] 1 Ch. 348.
(6) 14 Ch. D. 58, 66.

It is admitted by Sir Leslie Scott that the manner in which the King should perform this alleged duty is entirely in his discretion; that it is for the King to say whether any case for its exercise has arisen and in whose favour it ought to be exercised, and that the King could not be compelled by any process of law to perform it; it is "a duty of what is called imperfect obligation. Supposing that the King were to neglect that duty, I know of no legal means—that is, no process of law—common law or statute law—by which the Crown could be forced to perform that duty, but there is that duty of imperfect obligation on the part of the Royal authority": per Brett L.J. in *Attorney-General* v. *Tomline.* (1)

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(1) (1609) 10 Rep. 141*a*.

(2) L. R. 1 C. C. 161, 163.

(3) L. R. 5 P. C. 179, 200.

Whatever may be the extent of the duty which the King owes as liege lord or as defender of the realm—and I do not propose to attempt to define the limits of that duty—I am clearly of opinion that it does not extend to the provision of military guards for the plaintiff company's ships in the circumstances of the present case. If the aid of the armed forces of the Crown were available and were required in order to defend a British ship which was actually being attacked by pirates at the time, entirely different considerations would arise. That, however, is not the case here; the plaintiff company realizing that if it continues the Chinese passenger traffic such continuance will almost certainly lead to further internal piracy but being unwilling to discontinue that traffic has asked the Crown to provide military guards in order to assist its officers and crews in controlling the persons whom it intends to invite to become passengers in its ships and in preventing those passengers after they have been taken on board from committing piracy; in other words, has asked the Crown by means of its armed forces to assist it to continue its Chinese passenger traffic with more safety and thus enable it to earn the resulting profit. In the circumstances I entirely agree with the view expressed by the Crown to the shipowners that the provision of preventive measures against internal piracy is essentially a matter for the owners and forms no part of the duty of the Crown. It would, I think, be stretching the duty of the Crown beyond all reasonable limits to hold that it extended to providing military guards on ships belonging to private traders engaged in the Chinese passenger traffic in view of the fact that such traders are free to continue or discontinue this traffic as they please, and that the Crown has no right to control or interfere with the manner in which that business is conducted.

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(1) 14 Ch. D. 58, 66.

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CHINA NAVIGATION Co. v. ATTORNEY-GENERAL.

Lawrence L.J.

I know of no authority which lends countenance to the suggestion that it is the duty of the King either as liege lord or as defender of the realm to provide military guards for the protection of a ship which her owner voluntarily takes into foreign ports with the intention of embarking passengers some of whom to his knowledge may turn out to be pirates in disguise.

In the result I have come to the conclusion that there was no common law duty on the Crown to provide the military guards for the plaintiff company's ships, and consequently no question as to the Crown having demanded payment for the performance of a duty which it owed by the common law arises in this case. This conclusion, however, by no means disposes of the case. There remains the important and difficult question whether, assuming the Crown to be under no common law duty to provide the military guards but having in its discretion decided that it was a proper thing to do under the circumstances, the Crown can legally demand a money payment as a condition of rendering those services. This question has given rise to an interesting discussion on the position occupied by the Crown in relation to the Royal forces.

The contention of the plaintiff company stated shortly was that all prerogative powers in relation to the army in time of peace had long since been swept away; that the powers exercised by the Crown in relation to the disposition and use of the army in time of peace at the present day are purely statutory powers; and that the Crown has a statutory duty to exercise those powers whenever it considers they ought properly to be exercised, and cannot therefore in the absence of express statutory authority legally demand any payment as a condition of such exercise.

In support of the proposition that it is illegal for the Crown or any other body or person invested by statute with discretionary powers to exact money colore officii, Sir Leslie Scott relied mainly on the following cases: *Morgan* v. *Palmer* (1), where it was held that the Mayor of Yarmouth, who in his character of Mayor was one of the justices of the peace in and for the borough, had no right to demand a sum of money for granting the renewal of the annual licence of a publican: *Attorney-General* v. *Wilts United Dairies* (1), where it was held that the Food Controller had no power to impose as a condition of the grant of a licence to purchase milk in a certain area a charge of 2*d.* per gallon payable to him by the purchaser; and *Brocklebank, Ld.* v. *The King* (2), where it was held that the Shipping Controller had no power to impose as a condition of the grant of a licence to sell a ship to a foreign firm the payment to the Ministry of Shipping of a percentage of the purchase money.

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(1) 2 B. & C. 729.

The basis of the decisions in the two last-mentioned cases was that the demand of payment made by the Crown as a condition of granting a licence amounted to the levying of money for the use of the Crown without grant of Parliament contrary to the Bill of Rights and was therefore illegal. Lord Buckmaster in *Wilts United Dairies* case (3) says: "However the character of this payment may be clothed by asking your Lordships to consider the necessity for its imposition, in the end it must remain a payment which certain classes of people were called upon to make for the purpose of exercising certain privileges, and the result is that the money so raised can only be described as a tax the levying of which can never be imposed upon subjects of this country by anything except plain and direct statutory means."

The question whether the principle upon which these cases were decided applies to the facts of the present case depends entirely upon the nature and extent of the discretionary powers admittedly exercisable and exercised by the Crown in relation to the disposal and use of the army in time of peace. As to the nature of these powers Sir Leslie Scott has been at great pains to demonstrate that they are purely statutory, for which purpose he has placed before the Court a short historical survey of the position occupied by the Crown in relation to the royal land forces from the Conquest to the present time, culled from various well known writers.

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(1) 91 L. J. (K. B.) 897.
(2) [1925] 1 K. B. 52.
(3) 91 L. J. (K. B.) 900.

An admirable historical account of the army in a compendious form is to be found in the Manual of Military Law published by the War Office (particularly in Chapter II. dealing with the history of military law written by Lord Thring, and in Chapter IX. dealing with the history of the military forces of the Crown written by Sir H. Jenkyns), from which source I have taken most of the historical facts to which I am about to refer.

After the Restoration in 1660, considerable changes took place in the military system of this country, and the foundations for the present standing army were laid. Amongst the various Acts which were then passed I need only mention the statute of 13 Charles II., c. 6, containing the following recital which still stands unrepealed upon our statute book : " Forasmuch as within all His Majesty's realms and dominions, the sole supreme government, command and disposition of the militia, and of all forces by sea and land, and of all forts and places of strength, is, and by the laws of England ever was, the undoubted right of His Majesty, and his Royal predecessors Kings and Queens of England ; and that both, or either of the Houses of Parliament cannot nor ought to pretend to the same."

One of the causes which led to the Revolution in 1688 no doubt was the increase in the number of troops raised and maintained by James II., and to prevent trouble arising from such a cause in the future, the Convention Parliament, when calling the Prince and Princess of Orange to the throne, inserted in the Declaration of Rights a declaration that " the raising and keeping a standing army within the kingdom in time of peace, unless it be with consent of Parliament, is against law." This declaration was embodied in the Bill of Rights and in the first Mutiny Act. It has since been repeated in the subsequent Mutiny Acts and in the annual Army Acts down to the present time, and the army has since the year 1689 only continued to exist by virtue of the annual renewal of the sanction given by Parliament. In addition to the control which Parliament then assumed over the raising and payment of the army it also secured to itself full control over the discipline requisite for the government of the army.

The various statutory provisions relating to matters of discipline were finally consolidated in the Army Act, 1881, which of itself has no force but requires (see s. 2) to be brought into operation every year by an annual Army Act; each of these annual Army Acts contains a preamble reciting (inter alia) the illegality of raising or keeping a standing army in time of peace without the consent of Parliament, the necessity of continuing a body of forces for the safety of the United Kingdom and the defence of the possessions of the Crown, the number of such forces required, and the necessity of the observance of an exact discipline, and then enacts that the Army Act, 1881, shall be and remain in force for a period of twelve months.

As regards the payment of the army, Parliament grants the necessary money on estimates submitted by the Crown, but the expenditure of the money granted is left to the discretion of the Crown, subject only to audit on the part of Parliament.

Under the legislation referred to, a standing army has been maintained in England without intermission since the passing of the Bill of Rights. As the raising, government and payment of the army has always been expressly sanctioned by Parliament for a period of twelve months at a time, the army may properly be said to be a statutory and not a prerogative force, and the Crown is under the necessity of asking annually for the consent of Parliament to its maintenance.

Except in so far as Parliament has by statute regulated matters relating to the raising, keeping and discipline of the army, however, the Crown has retained and exercises many wide and important powers in relation to the army. It was by no mere oversight that the preamble to 13 Charles II., c. 6, has remained unrepealed, as in 1863 the whole of the rest of the Act was repealed, but the declaration as to the King's right to the government, command and disposition

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of the forces by sea and land was expressly left standing. It is to be noted that Parliament has never purported expressly to confer upon the Crown any powers of disposing or using the army or administering its affairs. When Parliament has given its consent to the raising and keeping of the army for the year, it leaves the Crown to exercise its prerogative powers as to the manner in which the army is to be raised and kept and in respect to the disposition and use of the army and the administration of its affairs. The manner in which these powers are exercised is constitutionally subject, like the exercise of other prerogatives, to the advice of the Ministers of the Crown, of whom the one particularly responsible for the army was, until recently, the Secretary of State for War. By letters patent dated February 6, 1904, all the prerogative powers of the Crown in relation to the army, which had theretofore been exercised by the Secretary of State, the Commander-in-Chief and other officials, were vested in the Army Council, to whom further powers were transferred by the annual Army Act, 1909, but the Secretary of State for War remains responsible to the Crown and Parliament for all the business transacted by the Council. It is unnecessary to specify the various powers relating to the army which Parliament has thus tacitly left to the unfettered control of the Crown; it is sufficient to state that they undoubtedly include the organization, armament, maintenance, disposition and use of the standing army in time of peace.

In my opinion, therefore, the powers which the Crown exercises as to the disposition and use of the standing army in time of peace are powers vested in the Crown by prerogative right at common law and are not powers conferred upon the Crown by statute.

However, the question whether the Crown was acting under its prerogative powers or under powers conferred upon it by statute, when acceding to the request of the plaintiff company to provide guards for its ships, is, in my opinion, not really the material question to be decided in this case. The extent of the powers exercisable by the

Crown in relation to the army is, in my opinion, the same whether they are technically prerogative powers or statutory powers. If, contrary to my opinion, they are statutory powers, Parliament has not limited them in any way save by the enactments already referred to, and, except as so limited, their scope must be measured by the powers which were vested in the Crown by prerogative right at the time of Charles II.

This brings me to the crucial question in the present case, whether the powers of disposition and use of the Royal forces vested in the Crown include a power to hire out troops to a British company at its request for the protection of its property and the lives of its employees. Admittedly the powers retained by, or vested in, the Crown, in relation to the army, are wide and undefined, and unless the plaintiffs can establish that these powers do not include a power to lend troops to a private individual for the protection of himself and his property in consideration of a money payment, or that the Crown by providing the guards in consideration of a money payment has violated some constitutional principle of which the Court can take cognizance, I think that the plaintiff company must fail on this appeal. In my judgment the powers of the Crown are wide enough to include a power to lend troops to a private individual for reward, and the Crown has not violated any constitutional principle in providing the guards in consideration of a money payment. The manner in which the Crown exercises its powers is not a matter which can be inquired into by a Court of law. As Lord Kenyon said in *Macdonald* v. *Steele* (1): "His Majesty's pleasure supersedes all enquiry, as he has the absolute direction and command of the army. It is true, Parliament has provided a sum of money, but that is to be distributed as the King chooses." The contention that the Crown, by imposing as a condition of providing the guards the payment of a sum of money to cover their pay whilst they are employed on that service, has attempted to levy a tax on the subject without grant of Parliament contrary to the Bill of Rights is, in my opinion, not well founded. The plaintiff company was at liberty to carry on its trade without any licence or interference from the Crown. The Crown was under no duty to provide the guards; the plaintiff company was free to accept or reject the offer made by the Crown. The facts of the present case are quite different from the facts in the cases upon which the plaintiff company has relied, and the principle referred to by Lord Buckmaster in the *Wilts United Dairies* case (1) has no application to this case.

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(1) Peake, 175, 176.

Sir Leslie Scott put his case on this point in the form of a dilemma. He contended that either the Crown in its discretion decided that it was necessary to provide the guards for the protection of the plaintiff company, in which case the Crown was performing a duty which it owed to the plaintiff company, or else the Crown was at the request of the plaintiff company making use of the army in a manner which was not authorized, in which case the contract was void as being contrary to public policy. This is the dilemma which, according to the speech of Lord Cave in *Glasbrook Bros., Ld.* v. *Glamorgan County Council* (2), was put by Atkin L.J. in that case in the Court of Appeal. The answer given by Lord Cave to the dilemma so put applies to the present case. It by no means follows that, because it was not the duty of the Crown to provide guards for the plaintiff company's ships, that therefore the Crown had no power to provide the guards and to demand the payment of a sum of money in consideration for making such provision. I know of no authority which prevents the Crown, if so minded, from employing any available soldiers in time of peace as well as in time of war in rendering services to private individuals, or from demanding and receiving remuneration for any services so rendered. It might form the subject of just criticism in the House of Commons if the Crown were to employ soldiers gratuitously for such purposes, but I see no valid reason for holding that such employment, with or without remuneration, is unconstitutional or against public policy.

(1) 91 L. J. (K. B.) 897.

(2) [1925] A. C. 270, 278.

The only cases to be found in the reports where the armed forces of the Crown have in time of peace rendered services to private individuals for reward are the salvage cases. These cases are not closely analogous to the present, although in some of them the Admiralty has made a claim for the use of His Majesty's ships and in others the Admiralty has deducted the pay of the officers and crew employed on the salvage operations from the amount recovered by them, but some of the passages in the judgments are not without interest in connection with this case.

In *The Mary Ann* (1), where a demand was made for the remuneration of salvage services which had been rendered by the commander and crew of one of the King's ships, Lord Stowell said: "Undoubtedly, the parties may fairly claim a remuneration, although the ship belongs to the State, and although there is an obligation upon King's ships to assist the merchant vessels of this country; yet, when services have been rendered, those who confer them are entitled to an adequate reward."

In the case of *The Lustre* (2) a Government steamer assisted a merchant vessel on a stipulation to reimburse all expenses arising from damage to the steamer or the stores, and it was held that such a stipulation was no bar to salvage compensation. Sir John Nicholl, in the course of his judgment, said: "It is a mistake to suppose that the public force of the country is to be employed gratuitously in the service of private individuals merely to save them from expense; these Government steam vessels are kept for the public service, and the officers in command cannot employ them in the service of individuals, and thus risk the public property without authority, or an indemnity for all expense and damage."

In the case of *The Ewell Grove* (3), where a merchant vessel was salved by a Government steamer and 200 men, and the Court awarded 1200*l.* and costs to the salvors, Sir John Nicholl said: "It is true that the *Rhadamanthus* is one of

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(1) 1 Hagg. Adm. 158.
(2) 3 Hagg. Adm. 154, 155.
(3) 3 Hagg. Adm. 209, 224.

H.M. ships, worked by steam, found and paid at the expense of the public, yet that does not give a title to private individuals to employ and be assisted by them without remuneration, any more than any other vessel in the public service. . . . . I have, therefore, no doubt as to the title of H.M. steam vessels, in case of civil salvage, to remuneration."

In the present case we requested the Attorney-General to procure a search to be made for precedents both at the Admiralty and at the War Office in order to see whether there was any and what practice on the part of the Crown in regard to charging for services rendered to private individuals by the naval or military forces. In response to this request we have been furnished with statements on behalf of the Admiralty and of the War Office. The Admiralty statement says that services rendered to private individuals for payment are subject to varying conditions according to the nature of the service, and that in general such services would only be rendered in special circumstances and in response to a definite request, and generally would not be undertaken if alternative private or commercial facilities were available. It also appears from that statement that in 1879 the principle of charging for the services of naval personnel was recognized in the Queen's Regulations (Art. 1772), which provided that where divers are lent to effect repairs to merchant ships a charge of 21*s.* a day is to be made for wear and tear of their dresses and apparatus, and in addition a sum that will cover the pay and allowances of the persons engaged for the time they may be actually absent from their ships. It also appears that in times of strike or civil commotion naval ratings have been employed in the absence of regular workers on railways in manning pumping and power stations, coal mine pumping machinery, lock gates, tugs and lighters conveying petrol oil and foodstuffs, and in loading and unloading these commodities, for which services it has been the practice to make a charge on the companies concerned based on the wages which would have been payable at current industrial rates if naval personnel had not been employed, or on the actual naval pay and allowances of the naval personnel employed, whichever was the greater amount.

Sir Leslie Scott contended that the navy stood on an entirely different footing from that of the army, and that what the Crown may have done in exercise of its prerogative in the case of the navy could have no bearing on the question what the Crown is empowered to do as regards the army. It is true that the navy was never looked upon as a menace to the country, as the army was considered to be in the seventeenth century, and that it has never been brought under control of Parliament to the same extent as the army, yet the preamble of 13 Charles II., c. 6, declares the prerogative rights of the Crown in respect of the forces both by sea and on land in the same terms, and, except in so far as there are any statutory restrictions, the prerogative powers of the Crown in relation to the army are the same as those in relation to the navy.

The statement from the War Office contains many instances of occasions upon which the War Office without statutory authority has received payment in respect of services rendered by the personnel of the army. From these instances it appears that for very many years it has been the practice of the War Office to demand and receive payments for services rendered to foreign countries, British Dominions, Colonies and private individuals. These payments fall under four heads—namely: (1.) payments for services rendered in ordnance factories; (2.) payments for services rendered by military forces; (3.) payments by Dominions, Colonial and mandated territories and foreign governments; and (4.) payments in respect of foreign missions.

The instances given include under head (1.) charges made to many private individuals and firms for goods sold and services rendered; under head (2.) charges for military protection afforded to Malta, the Ionian Islands and Ceylon, for services rendered to private individuals, companies and firms during the war by the Dock Battalion and the Transport Workers' Battalion, for services rendered by military fire brigades, and for lending troops to reputable British film companies; under head (3.) charges for British troops stationed in the territory of Dominions, Colonies and foreign countries; and under head (4.) charges in respect of foreign missions, all of which (with the exception of one instance in 1904 when ten officers were lent to the Turkish Government for services with the gendarmerie in Macedonia) were post-War missions arising out of the War.

In reference to the War Office, it is to be observed that no case has been found where a military guard has been provided for the ship of a trader who for his own profit sets out on a hazardous enterprise. In my opinion, however, the propriety of lending troops for such a purpose and of making a charge for doing so is not a matter which can properly be inquired into in a Court of law. If the wide powers which the Crown has and exercises with regard to the disposition and use of the army are to be restricted in any way this can only be done by Parliament. In view, however, of what has been said in the course of the argument, I would only add that if a shipowner asks the Crown to provide armed guards to assist him to control the passengers whom he invites on board his ship, and the Crown accedes to his request, it seems only reasonable that he, and not the public, should pay for that privilege.

Lastly, it has to be remembered that ever since Parliament has sanctioned the raising and keeping of a standing army in 1689, it has insisted upon a thoroughly open and independent examination of the annual army estimates and audit of the army receipts and expenditure. All receipts in respect of the army have to be applied as an appropriation in aid of the money provided by Parliament for that service under s. 2 of the Public Accounts and Charges Act, 1891, and have therefore to be brought into the army estimates. The amount which may be appropriated is definitely limited to the sum authorized by Parliament by the Appropriation Act of the year, and any sums received in excess of that amount is surrendered to the Exchequer as an extra receipt.

In practice, the Army Council submit their estimates to the Treasury, which critically examines them both as to the estimated expenditure and as to the estimated receipts.

After approval by the Treasury the estimates are submitted to Parliament by the Secretary for War, and may be discussed in Parliament before the granting of supply and the passing of the Appropriation Act. After the supply has been granted, the administration of the moneys granted is left to the War Office under the direction of an accounting officer, who is responsible to the Treasury and to Parliament for the due administration of those moneys. The accounts are audited annually by the Comptroller and Auditor-General, whose duty it is to report to Parliament any case in which he considers that service has been wrongfully given, or for which inadequate authority existed, or for which inadequate or improper payment was made. The accounts are then placed before the Public Accounts Committee of the House of Commons.

The sums paid by the plaintiff company for the provision of armed guards on its ships were included in the estimates for the years in which they were received as an appropriation in aid, and were duly granted by Parliament as part of the supply for the army for that year; they were subsequently passed as proper receipts by the Comptroller and Auditor-General. In the face of these facts it is difficult to see how the contention that the Crown has levied money for its use without grant of Parliament, contrary to the Bill of Rights, can successfully be maintained. Moreover, if, contrary to my opinion, the sanction of Parliament were wanted to the Crown hiring out troops to the plaintiff company and other shipowners trading in Chinese waters, such sanction is in my opinion necessarily implied from the grant by Parliament of the amount received by the Crown for such hire as part of the supply for the army.

In the result, for the reasons stated, I have come to the conclusion that the decision of Rowlatt J. was right, and that this appeal should be dismissed with costs.

Slesser L.J. In this case, declarations are sought against the Crown to the effect, in substance, that the Crown is not entitled to charge the appellant company for the use of troops employed to protect the property of the company and the lives of their employees in circumstances stated by my Lords, which I do not repeat.

The appellant company seek to support their case on three grounds. First, they say that the powers of the Crown with regard to the army are by law limited, and that in particular the common law and statutes which authorize or require the Crown to employ the army do not authorize it to make charges for the use of the army. Secondly, they argue that, in any event, even if the Crown has a discretion how it will protect the subject, yet that discretion should not be influenced by any consideration of the giving of money by the subject or the denial of such money. Thirdly, it is said that the Crown has a duty to protect the subject and that its officers cannot properly demand money from the subject, colore officii, as a term of the performance of that duty.

These three arguments I propose to consider in the order in which I have stated them.

(*a*) As regards the alleged limitation of the prerogative of the Crown in its disposition of the army: by 13 Car. 2, c. 6, it is declared that the sole supreme government, command and discipline of the militia and of all forces by sea and land is, and by the laws of England ever was, the undoubted right of His Majesty and his Royal predecessors, Kings and Queens of England. This declaratory Act is still law, and, as late as the year 1863, by the Statute Law Revision Act, 26 & 27 Vict. c. 125, Schedule, the words in the preamble of the Act of Charles II., which I have quoted, are expressly preserved.

" His Majesty's pleasure supersedes all enquiry, as he has absolute direction and command of the army ": per Lord Kenyon in *Macdonald* v. *Steele*. (1) " The government of the forces is vested in the Crown, who has power to make regulations as to command and administration " : Halsbury's Laws of England, vol. xxv., p. 37. "The supreme government and command of all forces by sea and land, and of all forts and places of strength, is vested in the Crown by prerogative right at common law and by statute": Halsbury's Laws of England, vol. vi., p. 418. This last quotation cites Comyns' Digest to the like effect, and although Sir John Comyns appears to limit his statement that "the government and command of the militia and of all the forces by sea and by land belong only to the King" (Prerogative—Command of the Forces, 4th ed., vol. vi., p. 33) to prerogative in respect of the King's own subjects in time of war, yet apart from the legalization of the army by the Army Acts, his submission would appear to be equally true as regards time of peace. It is by virtue of his prerogative that the King by letters patent in 1904 constituted the first Army Council, and it is there stated that the Army Council has been constituted "for the administration of matters pertaining to our military forces and the defence of our Dominions,' with such power and authority for the purpose as has hitherto been exercised under our prerogative" by various officers. Although by s. 71, sub-s. 1, of the Army Act, 1881, express provision is made for removing doubts as to the powers of command vested or to be vested in officers, by sub-s. 2 of that section it is expressly provided that nothing in the section shall be deemed to be in derogation of any power otherwise vested in His Majesty.

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(1) Peake, 175.

Sir Leslie Scott, confronted with the declaratory words of the Act of Charles II., sought to confine them to forces by sea and land existing at the time of the passing of that Act. He argued that in effect there were at that time no forces by sea and land other than the militia itself. It is true that an Act of the previous year (12 Car. 2, c. 15) had provided for the speedy disbanding of the army, but it appears that this disbanding had not been completed at the time when the 13 Car. 2, c. 6, was passed, for there are several later statutes of the reign of Charles II. dealing with the remnants of the then army: see Clode Military Forces of the Crown, Appendix 1. But, in any event, whether there were or were not at that time any forces by sea or land on which the statute could operate, other than the militia, it is clear from the language of the statute, which is a declaration of the existing prerogative, that the prerogative of command of the forces by sea or land has always been vested in the Crown, that it would equally apply in the absence of express statutory provision to any forces thereafter lawfully to be raised.

The language of the statute which I next consider is the first Mutiny Act (1 Wm. & Mary, c. 5). That Act, which contained provision for punishing officers and soldiers who should mutiny or desert their Majesties' service, was to continue until November, 1689, and it is significant that that Act contains no provision for amending or repealing the Act of Charles II. which had declared the prerogative.

In 1689 was passed the Act generally known as the Bill of Rights (1 Wm. & Mary, sess. 2, c. 2), which recites that the late King James II. "did endeavour to subvert and extirpate the Protestant religion and the laws and liberties of this kingdom . . . . by raising and keeping a standing army within the kingdom in time of peace without consent of Parliament," and declares, among other matters, "that the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of Parliament, is against law." This was by Chapter 2. By Chapter 4 of the same session was enacted the second Mutiny Act. The position, therefore, in 1689 was this: a standing army was illegal without the consent of Parliament, but once Parliament had given its consent, the standing army became legal; there is no indication in the statutes that the prerogative of the King with regard to the government or command of such a legalized standing army was in any way impaired.

It is not necessary, in my opinion, to consider in detail the subsequent Acts which continued annually to legalize the army. The earlier Acts did not specify the number of troops to be raised. This was not done until the Mutiny Act, 1714, and in 1715 power was given to the Crown to draw up articles of war for the discipline of troops in the United Kingdom. But such articles of war, which continue to have statutory authority (see the Army Act, 1881, s. 69), are to be distinguished from the King's Regulations which, with certain exceptions, continue to have force apart from the authority of statute. Articles of war are said by s. 69 of the Army Act, 1881, to be for the better government of officers and soldiers, and statutory power is given by s. 71 of the same Act to make regulations as to persons to be invested as officers. These regulations now appear among the King's Regulations, but the remainder of the Regulations have no statutory authority but are made by virtue of the prerogative.

It is also worthy of note that the responsibility, both to the Crown and to Parliament, of all the business of the Army Council borne by the Secretary of State, is conferred upon him by Order in Council and not by statutory provision: see the Order in Council, dated August 10, 1904.

In place of the Mutiny Acts, there is now passed an annual Army Act which, as a rule, contains amendments of the principal Act which it continues for one year. It provides in its preamble that the keeping or raising of a standing army within the United Kingdom in time of peace, unless it be with the consent of Parliament, is against law: see the Army and Air Force (Annual) Act, 1931, and provides that the Army Act and the Air Force Act shall be and remain in force during the periods thereafter mentioned, and no longer, unless otherwise provided by Parliament. (There follows a period to April 30, 1932, in Great Britain and Northern Ireland, the Channel Islands and the Isle of Man, with different provisions elsewhere: see s. 2, sub-s. 1.)

This short investigation of the history of the relations of Parliament and the army shows clearly that at no time has Parliament derogated from the prerogative with regard to the command of the forces as it was declared in the time of Charles II. It has declared the standing army illegal in time of peace without the consent of Parliament, but has abstained from interfering with the command by the Crown over a legalized army.

In so far as practice is to be considered in such a connection, the memorandum with which we were furnished by the War Office makes it clear that moneys have from time to time been received by the Crown without statutory authority for military protection; in 1846 from Malta, Ceylon and the Ionian Islands; from the old East India Company; during the late War the service of Dock Battalions and Transport Workers' Battalions were charged for, so also were soldiers released for civil work, and charges have been made for military fire brigades, regimental bands, and for the use of troops employed by film companies.

It is stated that from time to time almost every colony has in one way or another made payments to the British Exchequer in respect of British troops stationed in its territory. Payments have been made for the extra cost of British forces in Iraq and in Palestine by the Governments of those countries; by the Egyptian Government, and by certain foreign Commissions and Boundary Commissions. None of these payments was authorized directly or indirectly by statute. If Sir Leslie Scott's argument be correct, the whole, or most of them, would be contrary to law. Indeed, until the present case, I do not know that it has ever been questioned that the Crown has the right to receive payments for the use of troops used in one way or another by private persons or foreign Governments or Dominions of the Crown. It was at one time suggested in argument that Parliament would lose its financial control if the Crown received these moneys, but it has been made clear to us that the provisions of the Appropriation Acts guard against any such contingency. All the receipts resulting from the use of the army are brought into the appropriation account, and, although the sums so received are not always paid directly into the Exchequer, the Treasury, acting under the authority of the Public Accounts and Charges Act, 1891, allows the Department, instead of paying such receipts into the Exchequer, to use them to defray the expenditure of the year so far as they suffice to meet it.

Parliament, on being shown that the Department requires to spend a certain sum, but that receipts from fees, etc., will amount to a smaller sum, grants the difference, together with authority to use the sum received from the fees, and therefore the Department is limited to the gross expenditure from the sum granted and the fees, and is financially in exactly the same position as if it had asked Parliament for the whole sum and paid the fees into the Exchequer. The practice has varied from time to time, but the system of appropriation in aid, operating as I have described, removes all chance of the Crown receiving moneys which will not be under the control of Parliament: see May's Parliamentary Practice, 13th ed., pp. 529 et seq.

For all these reasons, I am of opinion that, once Parliament has sanctioned the army for a period of one year, there is no statutory limitation on the right of the Crown, acting under its prerogative of command and disposition of the forces, to make it a condition of the supply of troops for a particular purpose that a charge shall be made for them.

(*b*) In regard to the suggested influence of the Crown's discretion by considerations of the possibility of the receipt or denial of money.

On this matter there is little direct authority. The assumption that the Crown is entitled to make a stipulation that when a Government steamer assists a merchantman it shall be reimbursed all expenses arising from damage to the Government steamer is to be found in the case of *The Lustre* (1), in which Sir John Nicholl, in the course of his judgment, said: "It is a mistake to suppose that the public force of the country is to be employed gratuitously in the service of private individuals merely to save them from expense." This was clearly a case where the discretion whether the Government steamer should or should not be employed in a particular matter of salvage was decided upon an express stipulation that the owners and underwriters would be answerable for certain payments. So also in *The Ewell Grove* (2); later authorities and statutes as to salvage, such as the case of *Cargo ex Ulysses* (3), do not, in my view, affect the principle.

If the argument of the appellants here were right, such a consideration was improper, for, as was stated by Lord Stowell, in *The Mary Ann* (1): "There is an obligation upon King's ships to assist the merchant vessels of this country." In that case, salvage remuneration was claimed after service had been rendered, but in *The Lustre* (2) a stipulation for payment to cover damage was made before the commander exercised his discretion to allow the use of the ship.

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(1) 3 Hagg. Adm. 154, 155.

(2) 3 Hagg. Adm. 209.

(3) 13 P. D. 205.

In Chitty on Prerogatives of the Crown, 1820, p. 6, it is said: "In the exercise of his lawful prerogatives, an unbounded discretion is, generally speaking, left to the King"; and at p. 44: "The King is at the head of his army and navy, is alone entitled to order their movements, to regulate their internal arrangements . . . . as may seem to His Majesty most consistent with political propriety." According to Blackstone, Comm. i., 251: "In the exertion therefore of those prerogatives, which the law has given him, the King is irresistible and absolute, according to the forms of the constitution. And yet, if the consequence of that exertion be manifestly to the grievance or dishonour of the kingdom, the Parliament will call his advisers to a just and severe account."

Prerogative is "the discretionary power of acting for the public good": Locke on Government, 2, para. 166, quoted by Blackstone, Comm. i., 252. "The King has the sole power of raising and regulating fleets and armies": ibid. p. 262. He is "first in the military command, within the kingdom": ibid. p. 262. It is true that the prerogative is created and limited by the common law and that the sovereign can claim no prerogatives except such as the common law allows: Comyns' Digest, "Prerogative A." But in so far as such prerogative includes the government of the army, the Court cannot consider the propriety of its exercise. "Upon any doubtful point of prerogative the Crown and its Ministers must . . . . bow to the decision of the legal tribunals": Halsbury's Laws of England, vol. vi., p. 382. But, in so far as in my view the powers here under

(1) 1 Hagg. Adm. 158.

(2) 3 Hagg. Adm. 154, 155.

consideration are within the prerogative, the function of the Court is exhausted in so deciding.

I am of opinion that a declaration cannot be made against the Crown if, in its discretion, it refuses the provision of military protection to a subject unless such protection is paid for by the subject.

(*c*) Lastly, I have to consider whether the Crown or its Ministers can demand money from the subject colore officii as a term of the performance of the duty of protection.

In order to determine this matter it is necessary, first, to consider whether the Crown has a duty to protect the subject, and, if so, what is the nature of that duty. It is not suggested by Sir Leslie Scott that the duty for which he contends is one directly enforceable by the subject by process of law. It is, he says, a duty of imperfect obligation. The best passage for his purpose is that of Brett L.J. in *Attorney-General* v. *Tomline* (1), in which he uses the phrase: "duty of imperfect obligation." The duty there under consideration was the duty to protect the realm from the inroads of the sea. The Lord Justice says: "Supposing that the King were to neglect that duty, I know no legal means—that is, no process of law—common law or statute law—by which the Crown could be forced to perform that duty . . . . It is a right which as against the Crown the subject has no means to enforce: nevertheless the right exists." In the *Isle of Ely* case (2) Coke C.J. said: "The King ought of right to save and defend his realm, as well against the sea, as against the enemies, that it should not be drowned or wasted." A declaratory statute, 23 Hen. 8 c. 5, says: "By reason of our dignity, and prerogative royal, we be bound to provide for the safety and preservation of our Realm of England." The right to protection is not necessarily limited to the realm. "The protection and government of the King is general over all his dominions. . . . . Seeing power and protection draweth ligeance, it followeth, that seeing the King's power . . . . extendeth out of England, that ligeance cannot be local, or confined within the bounds thereof": *Calvin's Case* (1); see also per Cockburn C.J. in *Reg.* v. *Keyn* (2), and 1 Blackstone, p. 264. But Cotton L.J., in *Attorney-General* v. *Tomline* (3), expressly pointed out that the duty and obligation of the Crown was one which the subject could not enforce, "for this reason only, that the Crown is not amenable to the jurisdiction of the Court, and any default of duty on the part of the Crown . . . . cannot be made the ground of an action."

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(1) 14 Ch. D. 58, 66.

(2) 10 Rep. 141*a*.

The question then arises whether the many authorities which decide that money cannot be demanded colore officii have any application to a case where there is no enforceable duty, the performance of which can be refused unless payment is made. In *Attorney-General* v. *Wilts United Dairies* (4) Lord Buckmaster pointed out that no enactment enabled the Food Controller to levy any sum of money on any of His Majesty's subjects. That was a case where the Food Controller, an official having power under the Defence of the Realm Acts to make orders regulating the supply of milk products, obtained an agreement from the subject that in consideration of the issue of a licence to deal in milk he would pay a certain sum to the Food Controller. In the Court of Appeal (5) Bankes L.J. said: "It is not disputed for the Crown that the Food Controller could not without Parliamentary authority impose the charge complained of." Atkin L.J. points out (6) that by the Bill of Rights no money can be levied for or to the use of the Crown except by grant of Parliament; see also *Brocklebank, Ld.* v. *The King* (7), where the Shipping Controller was similarly held not to be entitled to charge for granting a licence.

Other cases such as *Wathen* v. *Sandys* (8) (a case of a sheriff being under a duty to erect hustings not being able to charge candidates with expenses, being part of a duty upon him in executing a writ to return members to Parliament);

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(1) 7 Rep. 9*b*.
(2) 2 Ex. D. 63, 236.
(3) 14 Ch. D. 58, 70.
(4) 91 L. J. (K. B.) 897.
(5) 37 Times L. R. 884, 885.
(6) Ibid. 886.
(7) [1925] 1 K. B. 52.
(8) 2 Camp. 640.

Morgan v. *Palmer* (1) (in which a justice of the peace sought a fee for renewing a licence of publicans); *Steele* v. *Williams* (2) (where a parish clerk sought illegally to make charges for extracts from a register book); *Snowdon* v. *Davis* (3); all establish the proposition stated by Martin B. in *Steele's* case (2) that a person who illegally takes money under cover of an Act of Parliament is liable to be sued for it. All these cases depended upon a duty existing in some person arising from his office, which duty that person refuses to perform unless he receives payment. In so far as there is here no enforceable duty in the Crown or its officers to use the troops in any particular way or at all, these cases do not appear to me to assist the appellants.

In *Glasbrook Bros., Ld.* v. *Glamorgan County Council* (4) it was argued that as there was a duty on the police to provide protection, the discretion as to the way that should be done was not to be bought or sold. Viscount Cave pointed out (5) that power may exist where there is no absolute duty—that is the present case—and that where there is no absolute duty a demand for payment is not necessarily contrary to public policy. The duty here, being of imperfect obligation, is not so absolute as to preclude a charge. I would add that, in any event, I have grave doubts whether the duty of imperfect obligation to defend the subject from enemies by the use of troops extends to the suppression of piracy on the seas. By 11 & 12 Wm. 3, c. 7, s. 11, an Act for the more effectual suppression of piracy, specific power is given to the judge of the High Court of Admiralty and other persons to raise and levy upon the owners of a ship and goods defended by officers, seamen and mariners, against pirates, enemies, or sea rovers, money to be distributed among the defenders, their widows and children. And, although for certain statutory purposes a pirate is to be deemed to be an enemy (Naval Discipline Act, 29 & 30 Vict. c. 109, s. 49), yet the definition of a pirate stated in Hawkins' Pleas of the Crown, c. 20, p. 251, still stands, that "a pirate is one who, to enrich himself, either

(1) 2 B. & C. 729.

(2) 8 Ex. 625.

(3) (1808) 1 Taunt. 359.

(4) [1925] A. C. 270.

(5) [1925] A. C. 279.

by surprise or open force, sets upon merchants or others trading by sea, to spoil them of their goods or treasure . . . . A pirate, at the common law, is a person who commits any of those acts of robbery and depredation upon the high seas, which, if committed on land, would have amounted to a felony there."

Were there no other obstacle in the way in the argument of the appellants in contending for the duty of the Crown, this consideration would have to be considered: whether the obligation of the Crown, such as it is, to protect the subject extends to a protection against pirates upon the high seas, and if so, whether it is not a duty cast upon the navy and not the army.

The duty of the King to protect his subjects is stated in Chitty on Prerogatives, p. 7, thus: "Protection, that is the security and governance of his Dominions according to law, is the duty of the Sovereign." Blackstone, vol. i., p. 262, indicates that monarchical government has for one of its purposes the protection of weakness of individuals by the united strength of the community. But as regards the duty of protection by sea, I do not know that such a duty can be put higher than is stated by Lord Stowell in *The Mary Ann* (1), that there is an obligation upon King's ships to assist the merchant vessels of this country: see also the observations of Sir James Hannen in *Cargo ex Ulysses* (2), which indicate that the Admiralty is the normal protector of the subject against pirates. Piracy is robbery within the jurisdiction of the Admiralty: *Attorney-General for Hong Kong* v. *Kwok-a-Sing* (3); *Rex* v. *Dawson.* (4)

I can find no obligation upon the army to protect merchant ships. If there be any such duty in the Crown, it would appear to be imposed not upon the army but upon the sea forces of the Crown, for the use of which there is no complaint as to charge in the present case. In any event, in such a case it is for the Crown to decide what resources in its armoury, naval or military, it will employ.

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(1) 1 Hagg. Adm. 158.

(2) 13 P. D. 205, 208.

(3) L. R. 5 P. C. 179, 200.

(4) (1696) 13 St. Trials, 451.

For all these reasons I am of opinion that this appeal must be dismissed.

Appeal dismissed.

Solicitors for appellants: *Thompson, Quarrell & Co.*
Solicitor for respondent: *Treasury Solicitor.*

J. S. H.

. LONDON COUNTY TERRI-
AND AUXILIARY FORCES
v. NICHOLS. [1948] 2 All
2.

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March 7, 8.

Landlord and Tenant—Rent Restrictions—Recovery of Possession—Dwelling-house—Crown as Landlord—Exemption from Rent Restrictions—Successive Purchasers—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12.

The Rent Restrictions Acts, 1920 and 1923, do not affect premises owned by the Crown, even when they fall within the limits laid down by those Acts. But upon a sale or assignment by the Crown this prerogative comes to an end, save only that where the premises are once sold subject to an existing tenancy that exemption continues until that tenancy is determined.

So *held* by the Court of Appeal, affirming the decision of the Divisional Court.

Observations of Romer L.J. in *Clark* v. *Downes* (1931) 145 L. T. 20, 22, explained.

APPEAL from Woolwich County Court.

The plaintiffs were the landlords and the defendant the tenant of a dwelling-house, No. 38 Allenwood Road, Well Hall Estate, Eltham, in the county of Kent, of which the standard rent and rateable value were within the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 2. From 1915 to 1928 the Well Hall Estate was in the ownership and possession of the Crown, and in September, 1919, the defendant became tenant of the above house from the Crown at a rent of 7*s.* 6*d.* a week. In 1928 the Crown sold the estate to the plaintiffs. On June 1, 1929, the plaintiffs determined this tenancy by a notice to quit and a notice of increase of rent to 10*s.* 6*d.* a week. There was thus, as the county court judge found, a new tenancy. The defendant accepted these terms and entered upon this tenancy at once, the landlords not having taken actual possession so as to decontrol the premises as provided by the Rent and Mortgage Interest Restrictions Act, 1923, s. 2. On April 30, 1931, the landlords served on the defendant notice to quit, expiring May 11, 1931, and on May 22 they issued a plaint in the county court to recover possession. The county court judge decided in favour of the landlords' claim, holding upon the authority of *Clark* v. *Downes* (1) that the Rent Restrictions Acts did not bind the Crown, nor the assignee of a tenancy created by the Crown, and that the landlords were entitled to the common law rights of lessors.

The tenant appealed.

Doughty K.C. and *Salter Nichols* for the tenant. The Rent Restrictions Acts apply to these premises, and the county court judge was wrong in law. This case differs from *Clark* v. *Downes* (1) in that here the tenancy, which was in force when the Crown sold the property to the landlords, came to an end in June 1, 1929. There was thus a new tenancy, and the exemption enjoyed by the Crown and the assignee of the Crown ceased to apply. This exemption does not extend to subsequent tenancies, otherwise the premises would be freed for ever from the restrictions imposed by the Acts.

Russell Vick for the landlords. The Crown is not subject to the Rent Restrictions Acts and can sell free from those restrictions. The purchasers who are the landlords here have the rights of a lessor at common law. In fact, they did not go into physical possession on the notional termination of the former tenancy, which took place on June 1, 1929. If physical possession was taken in any sense by the landlords, it was in 1929, at which time the Rent Restrictions Act, 1920, did not apply to the premises, for until then the premises enjoyed the immunity granted to houses belonging to the Crown. I rely on *Clark* v. *Downes*. (1)

(1) 145 L. T. 20.

TALBOT J. This is an action claiming possession of certain premises at Eltham in Kent, and also arrears of rent and mesne profits. The question, and I think the only question, is whether the defendant, who is the tenant of the house, is entitled to rely on the Rent Restrictions Acts in answer to that action. If he is, the plaintiffs cannot succeed. If he is not, there is no defence to the action so far as it claims possession. The decision of that question depends on this. This property, that is to say, the reversion subject to this tenancy—in other words, the landlords' interest—was for some years before 1928 in the Crown, and it has been held that the familiar prerogative doctrine applies and that, as the Crown has not been mentioned in the Rent Restrictions Acts, or mentioned only in one or two particulars, it is not, generally speaking, bound by those Acts. Therefore, as long as the Crown was the landlord of the defendant, the Crown had the common law rights of a lessor of land and houses and was not restricted in any way by those statutes.

In 1928 the Crown sold this house, with many others, to the plaintiff company, and the question is whether the plaintiff company are or are not subject to the restrictions of the Acts. In June, 1929, that is, less than a year after they bought the house, the plaintiff company served a notice to quit upon the tenant, giving him an option to remain as tenant at an increased rent. There is no doubt—indeed it is admitted—that in doing that they conceived themselves to be subject to the restrictions of the Acts, and probably we may take it that until lately no one thought to the contrary. It is contended, and I think not disputed, that the tenant having elected under that notice to accept a tenancy at a rent of 10*s.* 6*d.* a week, a new tenancy was created in law.

Now nearly a year ago, a point as to the position of the Crown with regard to the Restrictions Acts came, so far as I know, for the first time before the Courts in the case of *Clark* v. *Downes.* (1) The question there was whether the Crown was subject to the restrictions of the Acts. This Court, constituted of two members of the Court of Appeal sitting as additional judges of the King's Bench Division, decided that the Crown was not subject to the restrictions of the Acts, and that decision cannot be challenged and is not challenged in this Court. I think that the only occasion for controversy which has arisen in this case was caused by a passage in the judgment of Romer L.J., who was one of the two judges sitting on that occasion. Having agreed with the Master of the Rolls, who was the other member of the Court, on the first point, he proceeded to say (1): "The Acts not binding the Crown, it is the duty of the Courts so to construe the Acts as that the Crown and its property are in no way prejudicially affected by the Acts. Now, if the learned county court judge is right and these houses became subject to the operation of the Acts the moment they passed out of the ownership of the Crown, it follows that the reversion to the houses while in the possession of the Crown was worth considerably less than it would have been but for the Acts." That is to say, the Crown would be deprived of the power of selling the property exempt from the operation of the Acts and would have to put up with such lower price as a purchaser who would not get that exemption would be willing to pay. It is upon that passage, I think, that the contention of the respondents and the judgment of the learned county court judge in this case are grounded. It is perfectly true that if the Crown were entitled to sell this property, so long as the rent restrictions last, with immunity from the control which they impose, it presumably would, or at any rate certainly might, be able to command a purchase price considerably greater than that which it would get if it sold either with the consequence which Romer L.J. expressly mentions, or the lesser consequence which we are asked to adopt in this case. That is perfectly true. If what Romer L.J. there said applied necessarily to this case, probably we should think it right to follow it. I confess that if the point arose and if we were competent to deal with it, or if it arose before a Court which considered itself to be competent to deal with it, I think the question would be open

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(1) 145 L. T. 20.

(1) 145 L. T. 22.

to argument whether the learned Lord Justice was not going beyond what is necessary for the maintenance of the prerogative doctrine with regard to the operation of statutes upon the Crown. But what the learned Lord Justice said is satisfied, in my opinion, by that which the appellant here is content to assume to be right—namely, that where the property is sold with an existing tenancy, the purchaser, like the Crown, is exempt from the operation of the Rent Restrictions Acts. But what is said, and in one sense it is true, is that if the Lord Justice's words are to be followed literally, the operation of the Acts must inflict no disadvantage at all on the Crown. If so, this consequence would ensue, that, however many times the reversion changed hands and however many new tenancies were created, still this and other houses in the same position would remain, so long as these Acts operate, exempt from their operation. I, personally, am not prepared, in the absence of any authority, to extend what possibly may in itself seem to be rather an extreme application of the doctrine with regard to the effect of statutes on the Crown. I am not prepared to give it such an extension as that, and I think that, when the new tenancy was granted and accepted in 1929, this house ceased to be the subject of what is really the prerogative exemption of the Crown.

I think that exemption can only be extended, even if it can be extended at all (and I assume for the purposes of this judgment that it can be extended so far), to the duration of the tenancy which was in existence when the Crown divested itself of this property. The result of that is that, this house being admittedly a house within s. 12, sub-s. 2, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, the Act applied to it, and that decides this case in favour of the defendant.

There is another point taken, but, I think, not very seriously pressed, that the events of 1929 showed an actual contract between the parties, that this house should be treated as subject to the control of the Rent Restrictions Acts, whether in law, apart from such agreement, they applied or not. That issue, I think, the learned judge has decided. No doubt, it is perhaps partly a question of law, but it is mainly a question of fact, and I am not prepared to say that he came to a wrong conclusion.

The result is that the learned judge, in my opinion, was mistaken in the judgment which he gave. I think the defendant here is entitled to the protection of the Rent Restrictions Acts, and the appeal must therefore be allowed and judgment entered for the defendant in the county court; that is to say, so far as it is an action for possession.

MACNAGHTEN J. I am of the same opinion.

F. P. F.

The plaintiffs appealed. The appeal was heard on March 7 and 8, 1932.

R. K. Chappell K.C., *W. E. P. Done* and *Russell Vick* for the appellants. The Rent Restrictions Acts do not apply to the tenancy in question, and the notice to quit dated April 30, 1931, entitled the appellants to succeed in these proceedings. The Crown is not affected by the Rent Restrictions Acts, for the Crown is not bound by a statute unless specifically referred to or unless there is something in the statute to compel an irresistible inference that it is bound: Halsbury's Laws of England, vol. xxvii., p. 164; *Magdalen College* case (1); and *Mersey Docks and Harbour Board* v. *Cameron*. (2) The Crown, therefore, held the property free from the Rent Restrictions Acts, and that freedom extends also to the assignees of the Crown: *Clark* v. *Downes*. (3)

It will be said, however, for the respondents that a new tenancy was created by the notice of June 1, 1929, and therefore that the property came within the Rent Restrictions Acts. Even if a new tenancy was created, the right to be free of the statutes remains on foot, otherwise the value of the reversion assigned by the Crown would be in peril.

(1) (1615) 11 Rep. 66b.

(2) (1864) 11 H. L. C. 443.

(3) 145 L. T. 20.

[LAWRENCE L.J. After a new tenancy had been granted the old reversion would be gone.]

Further there has in fact been no new tenancy created. In order to bring a tenancy to an end there must be a proper notice to quit. The notice of January 1, 1929, was inoperative as a common law notice to quit, because it gave the alternative of paying an increased rent. That rent having been paid, the result was that nothing was changed, but the rent and the old tenancy continued. The notice was given under the mistaken belief that the Rent Restrictions Acts applied, and in all that was done there was no new tenancy created because there was no animus contrahendi. Under the Rent Restrictions Acts the notice would in fact have been bad, because it was wrongly assumed that the landlords alone were responsible for repairs. To terminate a tenancy at common law there must be a notice to quit giving no option to the tenant to stay on: *Doe* v. *Jackson* (1), but see *Ahearn* v. *Bellman*. (2)

[LORD HANWORTH M.R. referred to *Lyon* v. *Reed*. (3)]

The question whether there was a new tenancy created is a mixed question of law and fact. The county court judge has here found that the increase of rent created a new tenancy. That is not the law. At most the parties were endeavouring to create a statutory tenancy, the nature of which is described in s. 15 of the Increase of Rent, &c. (Restrictions) Act, 1920. There was here no intention to create a new tenancy. It was agreed in the county court that this was a question of fact.

[LORD HANWORTH M.R. You must come before us on the points taken in the Divisional Court.]

Mr. Russell Vick never gave the point away.

The rule that a point of law cannot be raised on appeal from a county court if it was not raised in the court below applies only to the appellant. The respondent can support the judgment at the hearing of the appeal upon any legal ground arising on the evidence: *Waller & Sons, Ld.* v. *Thomas*. (4)

(1) (1779) 1 Doug. 175.
(2) (1879) 4 Ex. D. 201.
(3) (1844) 13 M. & W. 285.
(4) [1921] 1 K. B. 541, 547.

[The Court held that, as the finding of the county court judge that a new tenancy had been created had not been challenged by the present appellants in the Divisional Court, it was not open to them to argue that question in the Court of Appeal.]

Assuming then that a new tenancy was created after the assignment of the property by the Crown, it is submitted that the ratio decidendi of *Clark* v. *Downes* (1) applies to protect the property from the operation of the Rent Restrictions Acts. To make a house a controlled house would be seriously to lessen its value. In the present case it would have the effect of lessening the value of Crown property, and would prevent the Crown from selling advantageously if the Acts could be held to threaten a purchaser from the Crown who created a new tenancy. Acts of Parliament must, if possible, be so construed as not to affect the rights of the Crown: *Perry* v. *Eames.* (2)

[They also referred to *Lloyd* v. *Cook.* (3)]

Doughty K.C. and *Salter Nichols* for the respondents were not called upon.

LORD HANWORTH M.R. The argument in this case has ranged over a wide field, but the point which has to be decided is a short and narrow one.

In September of 1916 the Crown were in possession of certain property at Eltham on which some houses had been built. I gather that they were put up for the purposes of the munition workers who were concentrated in that area. And so it came that on September 4, No. 48 Allenwood Road was let by the Crown to one McCardie at a sum of 9*s.* 6*d.* per week. Three years later, on September 15, 1919, the same house was let to Shaw, the present respondent, at 7*s.* 5*d.* per week. Meantime the reversion had passed through several hands. The original occupation was under the Defence of the Realm Acts, and at that time it was not certain how long the Crown would continue its occupation. On July 16,

(1) 145 L. T. 20.

(2) [1891] 1 Ch. 658.

(3) [1929] 1 K. B. 103.

1920, by an indenture of that date, there was a sale of the freehold of the land to the Woolwich Corporation. In October, 1924, the Crown bought the freehold, and obtained a registered title, and it appears that from and after October 3, 1924, the landlords were the Commissioners of His Majesty's Works and Public Buildings, so that after that time both the freehold and possession of the property, which had been taken under the emergency powers given to them during the War, were then vested in the Crown. Afterwards, on August 13, 1928, an agreement was entered into for the purchase of the property by the plaintiffs from the Crown, and on October 1, 1928, there was in fact a conveyance of the parcel from the Crown to the present appellants, who are the Wirral Estates Company, Ld.

The respondent, Shaw, had been in possession continuously since 1919, although the terms of his tenancy had apparently varied. There had been an increase of rent on February 25, 1921, by a sum of 1*s.* 9*d.* per week; yet he had remained in possession. On June 1, 1929, a notice was served upon him by the present appellants, which was in these terms: "We hereby give you notice to quit and deliver up to us as authorised agents on the tenth day of June next the house and premises situate at 38 Allenwood Road which you now hold of us as a weekly tenant or in the alternative take notice that we intend to increase the rent of 7*s.* 5*d.* per week to 10*s.* 6*d.* per week"; and whereas under the original Rules or Regulations whereby the defendant had been admitted to possession by the Crown he had been liable for a very small sum in respect of repair—I would call it rather damage than repair—and he was to be responsible for broken windows, now it is said that this notice of increase under head "D," which is for 7¾*d.* per week, was on account of responsibility for repairs, but that afterwards the question of repairs was dealt with otherwise. Now the tenant responded to that notice, and instead of going out and giving up possession, he in fact agreed and continued in possession and paid his 10*s.* 6*d.* rent. It is said that at that time both parties supposed—certainly the Wirral Estates Company, Ld.—that the tenancy

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was one to which the Rent Restrictions Acts applied, and apparently Shaw at the same time thought so, too, but the fact was that he continued in possession, and he paid his rent at the advanced sum. Later on the appellants came to the conclusion that it was doubtful whether or not this tenancy was one to which the Rent Restrictions Acts applied; and so on April 30, 1931, they served notice to quit on the basis that Shaw was in possession under what has been called a common law tenancy, and that the expiry of that notice would be on May 11, 1931. Shaw did not go out or give up possession; he did not take notice of that notice to quit of April 30, and on May 22, 1931, the Wirral Estates Company, Ld., issued a plaint in the county court against Shaw to recover possession of these premises, No. 38 Allenwood Road, on the ground that the tenancy had been determined by notice to quit.

The hearing took place on July 1 last year; judgment was reserved and was given on July 29. Under that judgment the learned judge, who very carefully considered the matter, came to the conclusion that, if the Rent Restrictions Acts did apply, possession could not be recovered from Shaw, but by a certain interpretation which he gave to a passage in Romer L.J.'s judgment in *Clark* v. *Downes* (1) he came to the conclusion that the property was one which was still under the ægis of the Crown, and inasmuch as the Crown is not bound by the Rent Restrictions Acts, those Acts could not be applied or adduced by Shaw as a defence, and thus that the order ought to go for possession.

After that judgment the matter came before the Divisional Court (Talbot and Macnaghten JJ.) on January 21. They did not take the same view as the county court judge had felt compelled to do of the case of *Clark* v. *Downes*. (1) They held that under the circumstances, as matters stood before the county court judge and themselves, there was a tenancy to which the Rent Restrictions Acts did apply, and that those Acts were available to the tenant. The result was that they reversed the judgment of the county court judge

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(1) 145 L. T. 20.

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and held that the order for possession ought not to go; and it is from that judgment that an appeal is taken to this Court.

A good deal has turned in this Court upon the question of the actual condition of the tenancy. What was the tenancy? Was it a common law tenancy, or was it a tenancy to which the Rent Restrictions Acts applied? Be it remembered that from and after October, 1928, the plaintiffs were the owners of the premises, and the Crown really had had nothing to do with the property. It is important, I think, to ascertain what were the facts as found by the county court judge. It has been claimed on behalf of the tenant that when the notice of June 1, 1929, was served upon him—a notice which is in the alternative form; either to deliver up possession or pay 10*s.* 6*d.* a week increase of rent—and the tenant responded, although the parties might not have known what their position was, in fact a new tenancy had been created between them. Whether or not a tenancy is created by an alteration in its terms is a question of fact. For instance, a small alteration, such as the abandonment of a single field out of a farm holding of a large number of acres at a reduction of a small sum in rent, may make no difference; and the same holds good where there is either an increase or a decrease in the rent. In both cases, however, there is evidence of a new tenancy, with the consequence that there would be a surrender of the old tenancy, for a new tenancy cannot be created between the parties except on the basis that there has been a surrender in law of the old tenancy. It is, as I say, a question of fact. When one turns to the judgment of the county court judge one finds that his opening words are these: "This is an action brought by the owners of an estate at Eltham, on which are a large number of small dwelling-houses, against one of their tenants, to recover possession of the house he occupies on the ground that his tenancy has been duly determined by notice to quit. The house is prima facie within the Rent Restrictions Acts; that is to say, it is a dwelling-house, the value of which is within the limits laid down by those Acts; but it is contended

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that the plaintiffs are free from the restrictions imposed thereby because this house, together with the rest of the estate, was formerly the property of the Crown from whom the plaintiff company acquired it in 1928. There is no dispute about the facts, the only question involved being the question of law whether the fact that the house formerly belonged to the Crown deprives the defendant of the right to claim the protection of the Acts." It is interesting to see the problem which at the time the judge thought was the one on which he had to pronounce judgment. When he comes to the questions of fact, he makes this observation: "It is clear that the rent payable under a common law tenancy cannot be raised without first terminating the existing tenancy by a notice to quit." It may be that he puts the proposition to which I have referred somewhat too widely, but I think he is referring to that proposition. He goes on: "The increase of rent is an alteration of the terms of the tenancy, and when, after the expiration of a notice to quit, the tenant stays on and pays a higher rent, a new tenancy is created. Such a notice to quit was served in the present case, and the lease created by the Crown was in my opinion thereby determined." Now it seems to me that the county court judge, who at the outset had said there was no dispute about the facts, definitely came to the conclusion, after considering the matter from the point of view of law, although he may have stated the direction which he gave to himself in law too widely, that after the response made to the notice to quit of June, 1929, a new tenancy had in fact been created between the parties. It was not a mere alteration of a single term of the old tenancy; it was a new tenancy. Mr. Chappell has contended before us that at that time the appellants did not intend to effect a surrender in law, and that unless there was an intention to make a contract there could not be a contract; but it must be remembered that the surrender in point of law is not a matter of intention, and for that the authority of Parke B. in *Lyon* v. *Reed* (1) can be cited; see also *Nickells* v. *Atherstone*. (2)

(1) 13 M. & W. 285, 306.

(2) (1847) 10 Q. B. 944.

What is effected is that by the operation of law a new relation is created in fact between the parties. In the present case I think the county court judge intended to hold that a new tenancy had been created.

That being so, he would not have made an order for possession unless he had felt bound by the terms of some additional words which are appended by Romer L.J. to his judgment in *Clark* v. *Downes*. (1) It appears to me that a careful examination of those words shows by their very terms that the Lord Justice was speaking of the reversion upon existing tenancies—tenancies which have been created by the Crown immune from the Rent Restrictions Acts, and that it would be impossible to hold in respect of those tenancies that the Rent Restrictions Acts applied, for the position of the landlord and the tenant would in many respects have been modified by the application of those Acts. Therefore, so long as that tenancy continues which had been created apart from the Acts, so long must the immunity continue even though the reversion had passed from the Crown; and we have the authority of Romer L.J. for saying that he did not intend to convey what the learned county court judge thought he had intended.

Now really that disposes of the case, because if the words that are used by Romer L.J. are appropriate only to an existing tenancy—a tenancy created by the Crown—the immunity cannot be passed on when there has been a succession of owners of the reversion. There does not appear to be any means whereby the immunity of the Crown which is clear from the Rent Restrictions Acts, because the Crown is not named, and for other reasons which I point out in my judgment in *Clark* v. *Downes* (2), can inure for the benefit of subsequent purchasers who are in quite a different position after the tenancies created by the Crown have run their course or been determined by notice to quit.

The matter came before the Divisional Court, and again I think it is quite plain that the Divisional Court considered

(1) 145 L. T. 20, 22.

(2) 145 L. T. 20.

the case on the basis of this new tenancy having been created. Talbot J. says this with reference to the claim that the immunity inured in favour of the subsequent owners after the Crown had sold the reversion: "I, personally, am not prepared, in the absence of any authority, to extend what possibly may in itself seem to be rather an extreme application of the doctrine with regard to the effect of statutes on the Crown. I am not prepared to give it such an extension as that, and I think that, when the new tenancy was granted and accepted in 1929, this house ceased to be the subject of what is really the prerogative exemption of the Crown." It seems plain from those words that just as the county court judge had dealt with the case on the basis of the new tenancy in 1929, so the parties when they were before the Divisional Court were also treating the basic facts as being that the house was under a new tenancy created in 1929. That being so, the only point that is open is whether there is an immunity of the Crown which passes to subsequent owners of the reversion, or not? As I have said, the words used by Romer L.J. in the passage referred to were never intended to convey such a meaning, nor do they convey such a meaning. I can find no warrant, no authority, for that proposition. It is said it would be inconvenient if immunity did not prevail even though the tenancies had ceased to exist. We have had our attention called to *Perry* v. *Eames* (1), which perhaps may be said to be an illustration of the same principle to which Romer L.J. referred in his additional reasons for his judgment in *Clark* v. *Downes* (2); but neither that case nor any other case is sufficient to establish that there is a sort of immunity running with the land which is to inure in favour of subsequent purchasers after the tenancies created by the Crown have come to an end.

On all these grounds it appears to me that the county court judge misdirected himself as to the effect of *Clark* v. *Downes*. (2) The judges in the Divisional Court were, in my opinion, perfectly right, and therefore this appeal must be dismissed with costs.

(1) [1891] 1 Ch. 658.

(2) 145 L. T. 20.

LAWRENCE L.J. In my judgment the decision of the Divisional Court in this case is right and ought to be affirmed.

In the first place, I agree that the question whether a new tenancy was or was not created in June, 1929, is not open in this Court. The learned county court judge decided clearly that a new tenancy had been created. In the Divisional Court the whole of the argument proceeded on the assumption that that decision was right, and the point that no new tenancy had been created was not taken. In these circumstances I think it would be wrong to allow the appellants to raise that question in this Court.

The next question which has to be considered is whether *Clark* v. *Downes* (1) covers a case where a new tenancy has been created. It is obvious that the actual decision in that case was only that the Rent Restrictions Acts did not apply to the case of a continuing tenancy, but it is said that the ratio decidendi covers the case of a new tenancy. A perusal of the judgments in that case has convinced me that this contention is not well founded, and that the question whether that case was rightly or wrongly decided does not arise in the present case. I therefore prefer not to express any opinion upon that question one way or the other, as I have not had an opportunity of hearing the arguments against the soundness of that decision, or of considering the cases upon which it was founded.

In these circumstances the only question on this appeal is whether the prerogative immunity of the Crown extends to a case where the purchaser of a freehold from the Crown subject to a tenancy has determined that tenancy and has created a new tenancy, and on this question, for the reasons given by Talbot J. and by the Master of the Rolls, I am clearly of opinion that the immunity does not extend to such a case.

The appeal, therefore, fails and ought to be dismissed.

ROMER L.J. I agree with the Master of the Rolls and Lawrence L.J. that in the circumstances it is not open to the

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(1) 145 L. T. 20.

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appellants in this Court to contend that the tenancy created by the Crown in September, 1919, is still in existence, and that a new tenancy was not created as a result of what took place in the month of June, 1929. Upon that part of the case I do not desire to add anything. I do, however, desire to say something about the decision of the Master of the Rolls and myself when sitting as a Divisional Court in *Clark* v. *Downes* (1), especially as to its applicability to the case that we now have to determine. The ground of the decision of the Master of the Rolls in that case, and the principal ground of my own decision, was this. It has been laid down that the Rent Restrictions Acts operate in rem, and not in personam; in other words, that the Acts affect the status of a house. Now s. 12, sub-s. 2, of the Act of 1920 defines the houses or parts of a house to which the Act is to apply, and the subsection says: "This Act shall apply to a house or a part of a house let as a separate dwelling, where either the annual amount of the standard rent or the rateable value does not exceed" the sums which are therein mentioned. From that it followed that in order to ascertain whether the status of the house had been affected by the Act it was necessary to look at the date when the tenancy was created which it was asserted affected the status of the house. Now, it being admitted that the Crown was not bound by the terms of the Acts, we, as it seems to me, were bound to come to the conclusion that the tenancy created by the Crown had not affected the status of the house; and that is all that the Master of the Rolls decided and that I decided in the first part of my judgment. We were not, of course, considering in any way the question whether a tenancy subsequently created by the purchaser from the Crown would or would not have the effect of altering the status of the dwelling-house. But having so decided, I perhaps unnecessarily, and certainly I think in the circumstances, unfortunately, proceeded to give another reason which would have enabled me, and which did enable me, to arrive at the same conclusion, assuming that I could have

(1) 145 L. T. 20.

accepted the argument put forward on behalf of the tenant. That argument was this: the house having been let at a rent which, apart from any question relating to the Crown, would have had the effect of altering the status of the house, the status does not remain unaltered during the whole tenancy but only during such portion of that tenancy as the reversion remains vested in the Crown; and I ventured to point out that if at the moment that the Crown sold the reversion of that tenancy the status of the house was altered by virtue of that tenancy created by the Crown, the result would be that the reversion in the hands of the Crown would necessarily be of smaller value than it would be if the status of the house was unaltered during the whole continuance of that tenancy. I ventured in the argument of this case to give an example, and I venture to repeat it now. If the house became affected by the Act the moment the reversion became vested in a purchaser from the Crown, the purchaser would be unable to recover the rent that the Crown had reserved so far as that rent exceeded the standard rate by more than is provided for by the Rent Restrictions Act. Now these houses in the present case were built by the Crown, and presumably let by the Crown at a rental which they thought would repay them sufficiently for the capital expended on the houses. If the effect of selling the reversion was that the purchaser of the reversion immediately after the assignment was unable to recover from the tenant the rent so far as it exceeded what would be permitted by the Act, assuming the Act applied, the value of the reversion to the Crown was seriously affected. It could not sell the benefit of the tenancy it had created for as much as it could have sold the benefit of that tenancy if the Act had never applied at all. I gave that as a reason for coming to the conclusion that the purchaser obtained the benefit free from the restrictions imposed by the Act. The reason was founded on the principle, which I think is a well established one, that, the Acts not binding the Crown, it is the duty of the Courts so to construe the Acts that the Crown and its property are in no way prejudicially affected by them. That is a principle which was applied by Chitty J. in the case of *Perry* v. *Eames* (1), to which our attention has been called. But while I think that that is a principle to be applied to the Rent Restrictions Acts and to other Acts of Parliament, it does not apply here, and for this sufficient reason: having regard to the Act of 1923, the purchaser of the reversion was in a position to avoid the Rent Restrictions Acts ever applying to the property which he had bought. He had only to determine the tenancy created by the Crown and enter into possession, and had he done so, then, as I understand s. 1 of the Act of 1923, and the decisions which have been given upon it, any subsequency tenancy created by him would not have the effect of altering the status of the house and bringing it within the operation of the Rent Restrictions Acts.

Now it is said that one ought to disregard the Act of 1923 and merely construe the Act of 1920. I do not take that view at all. The Act of 1923 and the Act of 1920 have now to be read as one Act, and that one Act is the Act which governs such matters as we have to consider here. Therefore, in considering whether the creation of a new tenancy by the purchaser from the Crown does or does not affect the status of the house, one must necessarily bear in mind that whether it does or does not cannot, or ought not in any way to have affected, the value of the reversion on the existing lease while it was in the possession of the Crown. They would sell it for no more and no less whether we hold that the effect of the new tenancy is to affect the status of the house, or whether we come to the opposite conclusion.

For these reasons, while in no way departing from the principle which I stated in *Clark* v. *Downes* (2), and which I still venture to think is correct, that principle, as it seems to me, has no application to the present case. For these reasons I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Woodroffes*; *Schultess-Young, Warren & Bird.*

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(1) [1891] 1 Ch. 658.

(2) 145 L. T. 20.

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Workmen's Compensation—Industrial Disease—Silicosis—Compensation paid under Various Industries (Silicosis) Scheme, 1928*—Employers' Application to Medical Board for Re-examination—Certificate of Medical Board that Workman no longer totally disabled—Stoppage of Payment of Compensation —Validity of Certificate—Various Industries (Silicosis) Scheme,* 1928 (*S. R. & O. No.* 975 *of* 1928), *paras.* 2, 10, 12, 15*—Silicosis and Asbestosis (Medical Arrangements) Scheme,* 1931 (*S. R. & O. No.* 341 *of* 1931), *paras.* 2, 3, 5, 9, 12*—Various Industries (Silicosis) Scheme,* 1931 (*S. R. & O. No.* 342 *of* 1931), *Preamble, paras.* 11, 12*—Workmen's Compensation Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *ss.* 12, 18, 19, 47.

On September 30, 1930, a workman obtained the certificate of a certifying surgeon under the Various Industries (Silicosis) Scheme, 1928, that he was suffering from the industrial disease called silicosis, and was thereby totally disabled from work. An appeal by the employers to the medical referee having failed, they paid compensation to the workman from September 25, 1930, the date of disablement. On September 19, 1931, the employers applied under para. 9 of the Silicosis and Asbestosis (Medical Arrangements) Scheme, 1931 (S. R. & O. No. 341 of 1931), to the Medical Board to have the workman re-examined, and on October 21, 1931, the Medical Board issued a certificate that the workman was no longer totally disabled. The employers thereupon stopped paying compensation, compensation in respect of silicosis being payable only during total disablement. The workman then commenced arbitration proceedings, but the county court judge, without going into the merits of the case, held that the certificate of the Medical Board had ousted his jurisdiction. On appeal:—

Held, by the Court of Appeal, (1.) that no power to apply for re-examination by the Medical Board was conferred by the 1928 Scheme even as modified by the Various Industries (Silicosis) Scheme, 1931 (S. R. & O. No. 342 of 1931). The proviso to the preamble to the latter Scheme that the provisions in that Scheme for examination and certification by the Medical Board should be substituted for the provisions in the 1928 Scheme as to examination and certification by the certifying surgeon and medical referee applied only to the examination and certification by the certifying surgeon and on appeal by the medical referee, which were a preliminary to the receipt of compensation by a workman under the 1928 Scheme and did not apply to the provision in that Scheme under which the procedure laid down in ss. 12, 19 and 20 of the Workmen's Compensation Act, 1925, were made applicable for the purpose of enabling the employers to stop payment of compensation;

(2.) that as under para. 9 of Scheme No. 341 of 1931 application for re-examination by the Medical Board could only be made "in pursuance of any Compensation Scheme," the employers had no power to apply for

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such a re-examination, and the certificate given by the Medical Board was inoperative;

(3.) that the matter must be referred back to the county court judge for reconsideration.

Remarks as to the unnecessary obscurity of S. R. & O. Nos. 341 and 342 of 1931.

APPEAL from an award of the judge of the Hanley and Stoke-upon-Trent County Court sitting as arbitrator under the Workmen's Compensation Acts.

The workman, William White, was employed by Winterton Pottery (Longton), Ld., until he became incapacitated on September 25, 1930. On September 30, 1930, he obtained the certificate of a certifying surgeon under the Various Industries (Silicosis) Scheme, 1928 (S. R. & O. No. 975 of 1928), para. 4, that he was suffering from silicosis, an industrial disease, and was thereby totally disabled from work, and that the total disablement commenced on September 25, 1930. An appeal by the employers to the medical referee under para. 6 was dismissed, and they paid compensation to the workman at the rate of 27*s.* 8*d.* a week, commencing from September 25, 1930, until October 17, 1931. On September 9, 1931, the employers had applied under para. 9 of the Silicosis and Asbestosis (Medical Arrangements) Scheme, 1931 (S. R. & O. No. 341 of 1931) to the Medical Board appointed under that Scheme to have the workman re-examined; and on October 21, 1931, the Medical Board issued a certificate of re-examination and certified that the workman was no longer totally disabled from work by reason of silicosis or silicosis accompanied by tuberculosis. It was as a result of this certificate that the employers stopped the payment of compensation, as under the Silicosis Schemes compensation is only payable during total disablement.

On October 28, 1931, the workman commenced proceedings for arbitration, claiming to be totally disabled and to be entitled to the continuance of the payment of compensation. The main question at issue in the proceedings was whether the certificate of re-examination was valid.

Scheme No. 975 of 1928 (being a scheme dated December 11, 1928, made by the Secretary of State under the Workmen's

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Compensation Act, 1925) provides: "2. This Scheme shall come into force on the 1st February, 1929, and shall apply to all workmen employed at any time on or after 1st January, 1929, in any of the following processes . . . ."

"10. The compensation payable under this Scheme shall be paid in accordance with the provisions contained in the Act [Workmen's Compensation Act, 1925] under the head *Amount of Compensation* (sections 8 to 13 inclusive) for fixing the compensation in cases of death and total disablement and the said sections shall apply accordingly . . . ."

"12. Sections 17, 18 and 19 of the Act (relating to submission to medical examination) and section 20 (relating to suspension of right to compensation), and any regulations and rules of court made thereunder, shall apply in the case of any workman claiming or in receipt of weekly payments of compensation under this Scheme . . . ."

"15. All claims to compensation and, except as otherwise provided in this Scheme, any questions arising under this Scheme shall be determined in accordance with the provisions contained in the Act under the head *Procedure for Determining Compensation and Settling Questions* (sections 21 to 28 inclusive), and the said provisions and any regulations and rules of court made in pursuance thereof shall apply accordingly."

The Silicosis and Asbestosis (Medical Arrangements) Scheme, 1931 (S. R. & O. No. 341 of 1931), being a Scheme dated April 30, 1931, made by the Secretary of State under the Workmen's Compensation Act, 1925, and the Workmen's Compensation (Silicosis and Asbestosis) Act, 1930, provides:—

"2. *Definitions.*—In this scheme, unless the context otherwise requires: 'The Act' means the Workmen's Compensation Act, 1925, as extended by the Workmen's Compensation (Silicosis and Asbestosis) Act, 1930. 'Compensation Scheme' means a Scheme made under section 47 of the Act providing for the payment of compensation by the employers of workmen in the industry or process . . . . specified therein."

"3. A Medical Board consisting of specially qualified medical practitioners shall be appointed by the Secretary of State for the purpose of making the medical examinations and reports and giving the medical certificates required to be made or given by the Medical Board in pursuance of this Scheme or any Compensation Scheme. . . . ."

"5. Any certificate given by the Medical Board in pursuance of the provisions of this Scheme shall be conclusive evidence of the matters therein certified. . . . ."

"9. Where in pursuance of any Compensation Scheme application is made to the Medical Board by or on behalf of an employer or a workman . . . . for a re-examination of a workman who has been certified under this Scheme or any Compensation Scheme, the Board shall re-examine the workman and give a fresh certificate in the appropriate form set out in the Second Schedule to this Scheme confirming or amending the previous certificate. . . . ."

"12. Every workman newly engaged for work in any industry or process included in the First Schedule to this Scheme . . . . shall unless he has already been medically examined under this Scheme or any Compensation Scheme within the preceding twelve months, submit himself for examination by a member of the Medical Board . . . . before the end of the second month of such employment. . . . ."

The Various Industries (Silicosis) Scheme, 1931 (S. R. & O. No. 342 of 1931), dated April 30, 1931, made by the Secretary of State, was headed by the following statement signed by him (hereafter referred to as "the Preamble"):

"In pursuance of the powers conferred on me by section 47 of the Workmen's Compensation Act, 1925, as extended by the Workmen's Compensation (Silicosis and Asbestosis) Act, 1930, I hereby make the Scheme of Compensation annexed hereto and direct that it shall come into force on the 1st June, 1931, in substitution for the Various Industries (Silicosis) Scheme, 1928, as amended by the Various Industries (Silicosis) Amendment Scheme, 1930.

Provided that the Various Industries (Silicosis) Scheme, 1928, as so amended shall continue to apply in cases of workmen who have been employed on or after the 1st January, 1929, in any of the processes specified in paragraph 2 of that

Scheme as so amended, but are not entitled to claim compensation under this Scheme; except that the provisions in this Scheme as to examination and certification by the Medical Board shall be substituted for the provisions in the Various Industries (Silicosis) Scheme, 1928, as to examination and certification by the Certifying Surgeon and Medical Referee, and the Medical Board shall have the same powers and duties in cases arising under that Scheme as in cases under this Scheme."

The material provisions of the Scheme itself are:—

"11 (1.). The provisions of the Act relating to submission to medical examination, and so far as regards examinations made by a medical practitioner provided and paid by the employer, the provisions relating to suspension of the right to compensation, and any regulations . . . . and rules of court made thereunder, shall apply in the case of any workman claiming or in receipt of weekly payments of compensation under this Scheme. . . . ."

"12. It shall be the duty of every workman—(*a*) to submit himself to the periodic and other examinations provided for under this Scheme or the Silicosis and Asbestosis (Medical Arrangements) Scheme, 1931, ..."

The county court judge said: "It was submitted for the applicant that the certificate of re-examination was not valid, and reference was made to section 47 of the Act of 1925, the Various Industries (Silicosis) Scheme, 1928, the Various Industries (Silicosis) Amendment Scheme, 1930, the Workmen's Compensation (Silicosis and Asbestosis) Act, 1930, the Various Industries (Silicosis) Scheme, 1931, the Silicosis and Asbestosis (Medical Arrangements) Scheme, 1931, and the Silicosis and Asbestosis (Medical Fees) Regulations, 1931; and it was contended before me that the respondents' application to the Medical Board had not been made in pursuance of the opening words of para. 9 of the Medical Arrangements Scheme—namely, 'where in pursuance of any Compensation Scheme.' For the respondents it was contended that the intention of the Medical Arrangements Scheme, 1931, was that all medical questions should be settled by the

Medical Board, consisting of specially qualified medical practitioners, and that, therefore, the application to the Medical Board had been properly made, that the certificate of re-examination issued by the Medical Board was valid, and that by reason of para. 5 of the Medical Arrangements Scheme it was conclusive evidence of the matters therein certified and was binding upon me.

I decided that the certificate of re-examination issued by the Medical Board was valid by reason of para. 9 of the Medical Arrangements Scheme, that my jurisdiction was entirely ousted by the provisions of the Medical Arrangements Scheme and the issue of the certificate of re-examination, and that the respondents had properly terminated the weekly payments of compensation. I also decided that the fact that the applicant was certified initially under the Silicosis Scheme, 1928, did not affect the legal position as above decided by me. I therefore dismissed the application of the applicant with costs."

The workman appealed. The appeal was heard on April 6 and 7, 1932.

Edgar Dale for the appellant. The county court judge was wrong to treat his jurisdiction as ousted by the certificate of the Medical Board: (1.) because under the Silicosis Scheme, 1928, it could not be used by the employers as a ground for stopping compensation, and (2.) because, as the 1928 Scheme applied, it was ultra vires the Medical Board to give the certificate, with the result that the certificate was useless. The Medical Board purported to make a re-examination under para. 9 of Scheme No. 341 of 1931, and their certificate is conclusive evidence of matters certified in it by para. 5. But para. 9 only authorizes a re-examination by the Medical Board where "in pursuance of any Compensation Scheme" application is made to the Medical Board on behalf of an employer or workman. There is no power in the 1928 Scheme to ask for re-examination, and therefore that paragraph has no application. Under the 1928 Scheme s. 12 of the Workmen's Compensation Act, 1925, is made applicable by para. 10 and ss. 18 and 19 by para. 12. The result is that stoppage of compensation is only permitted when one of the three sets of circumstances mentioned in s. 12 is satisfied. Of these the only one applicable to this case was that where a medical practitioner who had examined the workman under s. 18 had certified that the workman was wholly or partially recovered. The workman on having notice of this served on him may have himself examined by his own practitioner, and if the reports disagree an appeal to the medical referee can be made by the employer under s. 19. The Preamble to Scheme No. 342 of 1931 may have the effect of substituting the Medical Board for the medical referee for the purpose of this appeal, but it does nothing to affect the previous examination by the medical referee. Para. 11 (1.) makes this abundantly clear, for it provides (amongst other things) that the provisions of the Act as to examination made by a medical practitioner provided and paid by the employer are to apply to the case of any workman in receipt of weekly payments of compensation under that Scheme. It must follow that nothing in that Scheme relating to examination by a Medical Board as made applicable to the 1928 Scheme by the Preamble can affect the right to have examination by a medical practitioner in accordance with s. 19 of the Act as incorporated in the 1928 Scheme. It follows that there is nothing in the 1928 Scheme, as modified by the Preamble to Scheme No. 342 of 1931, to authorize a re-examination not by way of appeal under para. 9 of Scheme No. 341 of 1931.

The point is something more than a purely technical one, for under the 1928 Scheme the workman has also the benefit of s. 9, sub-s. 4, by which a county court judge may treat as totally incapacitated a workman who is only partially incapacitated if owing mainly to his injury he is unable to obtain work. It may be presumed that in a case where s. 9, sub-s. 4, applied the registrar or county court judge would never refer the matter to a medical referee under s. 19. It is to be noted that para. 15 of the 1928 Scheme gave the county court judge power to settle any question arising under the Scheme, and it would be surprising if, after that, his jurisdiction could be ousted by a certificate of the Medical Board.

Cave K.C. and *S. A. H. Burne* for the respondents. The expression "re-examination" appears for the first time in para. 9 of Scheme No. 341 of 1931, and the certificate given under this paragraph is referred to in Form D of the Second Schedule as a "certificate of re-examination." Para. 9 therefore provides for re-examination of workmen by the Medical Board when in receipt of compensation. That Scheme is made under the power conferred by s. 47, sub-s. 3 (*d*). It is contended that the Preamble to Scheme No. 342 of 1931 has as its object to make this provision for re-examination applicable to the workmen to whom the 1928 Scheme applies. The only difficulty in the way of this contention is para. 11 of Scheme No. 342. But it is contended that the incorporation of the provisions of the Workmen's Compensation Act, 1925, made by para. 11 (1.) must be limited to those provisions not inconsistent with other provisions of the Scheme, including para. 12 (*a*).

[LAWRENCE L.J. Where do you find para. 9 of Scheme No. 341 incorporated in the 1928 Scheme ?]

It is contended that the whole of the provisions of that Scheme are incorporated. Further, although para. 11 (1.) of Scheme No. 342 incorporates the provisions of the Act "so far as regards examination made by a medical practitioner," that can only apply if the particular course provided for in s. 12 of the Act is adopted. There is nothing to prevent the employers adopting a different course of action—namely, an application to the Medical Board for re-examination, in which case s. 12 is inapplicable.

[LORD HANWORTH M.R. Para. 11 (1.) gives a list of provisions of the Act retained, and the only alteration is that "any reference required to be made to a medical referee . . . . shall be made to the Medical Board." There is no substitution of the Medical Board for the medical practitioner.]

In any case the workman by submitting in this case to re-examination by the Medical Board has abandoned the right to object to the course adopted by the employers.

It is no longer open to him to say that that course was improper.

Edgar Dale in reply. The workman was placed in a grave difficulty when called upon to submit to re-examination by the Medical Board. If he had not done so, his compensation would have been stopped. An attempt was made by the employers here to adopt a new procedure which would enable them to go direct to the Medical Board and deprive the county court judge of his jurisdiction. A workman cannot, by submitting to an examination which on the true view was not authorized, deprive himself of the rights conferred on him by the Act of and the Scheme of 1928: compare *Anderton* v. *Markham, Heywood & Co.* (1) and *Dutton* v. *Sneyd Bycars Co., Ld.* (2)

LORD HANWORTH M.R. Before giving judgment in this case I desire to say, with the assent of my colleagues, that this is a case which never ought to have given rise to any difficulty either before the county court judge or in this Court, if sufficient attention had been paid to the drafting of these Orders No. 341 and No. 342 of 1931, both of which were issued from the Home Office under date April 30, 1931. There is no palliation for the obscurity of their terms such as there is sometimes in the case of an Act of Parliament which, in the course of passing through the two Houses of Parliament, has been the subject of amendments. These amendments often complicate the Bill and cause inconsistencies, but these two Orders were issued complete from the Home Office on the same date, and care should have been taken to make the one complementary to the other so as to avoid the difficulties which plainly arise upon them. As it is the parties have been placed in a difficulty, the learned county court judge has been placed in a difficulty, and this Court finds great difficulty in construing the terms of the Orders. [His Lordship then stated the facts and continued:] The case was heard before the county court judge on January 21, 1932. He found himself in a difficulty, as well he might, in endeavouring to construe the two Orders Nos. 341 and 342 of 1931, and he decided that the certificate

(1) (1925) 18 B. W. C. C. 121.

(2) [1920] 1 K. B. 414.

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given by the Medical Board on October 21, 1931, was valid and, in effect, ousted his jurisdiction. Perhaps I might usefully indicate the difficulty in which he was placed by citing a paragraph from his judgment: "It was submitted for the applicant that the certificate of re-examination was not valid, and reference was made to s. 47 of the Act of 1925, the Various Industries (Silicosis) Scheme, 1928, the Various Industries (Silicosis) Amendment Scheme, 1930, the Workmen's Compensation (Silicosis and Asbestosis) Act, 1930, the Various Industries (Silicosis) Scheme, 1931, the Silicosis and Asbestosis (Medical Arrangements) Scheme, 1931, and the Silicosis and Asbestosis (Medical Fees) Regulations, 1931, and it was contended before me that the respondents' application to the Medical Board had not been made in pursuance of the opening words of para. 9 of the Medical Arrangements Scheme—namely, 'where in pursuance of any Compensation Scheme.'" He, therefore, finding his jurisdiction ousted, held that the condition of the workman was finally determined by the decision given by the Medical Board on October 21, 1931, with the result that the workman was not entitled to recover compensation. From that decision the workman appeals, and he appeals on two grounds: first, that this certificate, even if it is good, is not a sufficient certificate to entitle the employers to stop payment of compensation, and secondly—and this is the important point—that the certificate given by the Medical Board was not effective but ultra vires, inasmuch as it was not given after the proper procedure had been followed.

We have had the advantage of arguments by learned counsel on both sides, fully versed and experienced in the Workmen's Compensation Acts. It is extremely hard to find a way through the paragraphs of No. 341 and No. 342 of 1931, and in allowing the appeal we have decided to do so without costs, because of the great difficulty in which the county court judge and the parties were placed, both in the court below and in this Court; and we have decided that the matter must go back to the learned county court judge for further consideration by him.

It is, however, necessary for me to explain why we have come to a conclusion different from that reached by the learned county court judge. For this purpose it is necessary to go back to certain sections of the Workmen's Compensation Act, 1925. It will be remembered that where a workman is entitled to compensation under either an agreement or an award, provision is made for a review of the weekly payments under s. 11 of the Act; and for the purpose of enabling the employers to have a review s. 18 provides that the workman shall, if required by the employers, submit himself to a periodical medical examination. Sect. 19, sub-s. 2, provides that where he has submitted himself for examination but does not accept the conclusion arrived at on that examination both parties have a right under the conditions stated in the section to have the matter referred to a medical referee. More than that, s. 12 provides that the employer is not to end or amend a weekly payment except in the three cases which are provided, one of them being: "Where the medical practitioner who has examined the workman under section eighteen of this Act has certified that the workman has wholly or partially recovered, or that the incapacity is no longer due in whole or in part to the accident, and a copy of the certificate . . . . together with notice of the intention of the employer at the expiration of ten clear days . . . . to end the weekly payment, or to diminish it . . . . has been served by the employer upon the workman." The workman can, however, send a report of a duly qualified medical practitioner disagreeing with the certificate, and then there is provision for the dispute going to a medical referee in pursuance of s. 19 of the Act. It will thus be seen that provision is made for submission to examination, for revision of the result of that examination, and, under s. 12, for a particular procedure whereby the matter may come before the medical referee. Sect. 43 of the Act provides that in certain cases industrial diseases may be treated as affording a right to compensation within the Act, and the date of the supposed accident is to be the date of the disablement determined by the certifying surgeon of the district, who has to certify under s. 43 whether or not the workman is disabled; and under s. 43, sub-s. 1 (iii.) (*f*)—" If an employer or a workman is aggrieved by the action of a certifying or other surgeon in giving or refusing to give a certificate of disablement " the matter can be submitted, in accordance with the regulations made by the Secretary of State, to a medical referee, whose decision is to be final. Sect. 47 of the Act enables the Secretary of State to provide by a Scheme for the Act applying to a workman suffering from silicosis; so that under s. 47 and the Scheme made thereunder it is possible to bring silicosis within the system of industrial diseases provided for by s. 43. And, under sub-s. 3 of s. 47 provision may be made by the Scheme for the determination of disputes and for the appointment of medical boards, medical officers and the like, for the purpose of reaching a conclusion on the important points whether or not the worker is suffering from silicosis in the first instance, and, later, whether he has recovered therefrom. Provision may also be made under sub-s. 3 (*e*)—" for requiring workmen to whom the scheme applies (i.) to submit themselves to such periodical medical examination, and (ii.) to furnish such information with respect to their previous employment in any industry specified in the scheme . . . . as may be prescribed by the scheme" in order to see whether or not they are suitable for work in the industry and whether there is a tendency or a likelihood of their becoming subject to the disease of silicosis.

I need not now dwell on the Scheme of 1928, which was the earliest Scheme under s. 47, but I turn to No. 341 of 1931—the Medical Arrangements Scheme. That provides in para. 5 that the certificate of a Medical Board, given in pursuance of the provisions of this Scheme, is to be conclusive evidence of the matters therein certified. By para. 9, which I will not read, it is provided that where " in pursuance of any Compensation Scheme " application is made to the Medical Board by or on behalf of the employer for a re-examination of a workman who has been certified under any Compensation Scheme the Medical Board shall re-examine the workman and give a fresh certificate. It appears to me that the argument of Mr. Dale is right in respect of that, and that this paragraph is incorporated in any Compensation Scheme in which provision is made for a re-examination by the Board, and that only then are its terms operative. It is clear that No. 341 and No. 342 of 1931 are to be read together. They were published on the same day. No. 341 contains the forms which are to be used; indeed, without No. 341 there would be difficulty in carrying out No. 342. No. 342 opens with what looks like a preamble, but is plainly intended to be an operative and effective part of the Scheme. It directs that the Scheme is to come into force on June 1, 1931, in substitution for the Scheme of 1928. But there is a proviso that the 1928 Scheme (No. 975 of 1928), as amended by a 1930 Scheme, "shall continue to apply in cases of workmen who have been employed on or after the 1st January, 1929, in any of the processes specified in paragraph 2 of that Scheme as so amended, but are not entitled to claim compensation under this Scheme; except that the provisions in this Scheme as to examination and certification by the Medical Board shall be substituted for the provisions in the Various Industries (Silicosis) Scheme, 1928"—that is No. 975—"as to examination and certification by the Certifying Surgeon and Medical Referee, and the Medical Board shall have the same powers and duties in cases arising under that Scheme as in cases under this Scheme." We have pointed out in the course of the argument that the exception seems to relate to the provisions as to examination and certification by the certifying surgeon and medical referee, which have to be carried out before a workman is brought within the benefits provided in respect of an industrial disease, whether under s. 43 or s. 47, and that it is not intended to apply generally to all examinations. It applies to the particular examination and certification by the certifying surgeon and medical referee necessary to provide the qualification of the workman to be compensated in respect of his suffering from an industrial disease. The words are not clear, but we have come to that conclusion.

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Now I come to paras. 11 and 12. I have called attention to the fact that under s. 47, sub-s. 3 (*e*), power is given to require workmen to submit themselves to periodical medical examination, the purpose of which is to find out whether they continue to be suitable for the work or are prone to the disease. Para. 12 seems to be for the purpose of carrying that power into effect. It says it shall be the duty of every workman to submit himself periodically for examination. The language does not seem to give that paragraph a wider significance than is necessary for the purpose of carrying into effect sub-cl. (*e*) that I have referred to. I should add that the 1930 Act (20 & 21 Geo. 5, c. 29) also provided for the same system. That Act made an extension of s. 47, and by s. 2, sub-s. 1 (*d*) enacted that provision might be made by a scheme "for securing that employers—(i.) shall not employ in any industry or process involving exposure to silica dust or asbestos dust any workman who has been suspended in pursuance of the scheme or has refused or wilfully neglected to submit himself to any examination required in pursuance of the scheme." Para. 12 is intended therefore to provide a system safeguarding workmen engaged in this business or trade from the dangers of silicosis. That appears to exhaust the effect and purpose of para. 12.

Para. 11 of Scheme No. 342 of 1931 provides that "The provisions of the Act relating to submission to medical examination, and so far as regards examinations made by a medical practitioner provided and paid by the employer, the provisions relating to suspension of the right to compensation, and any regulations (excepting those determining the fees payable to medical referees) and rules of court made thereunder, shall apply in the case of any workman claiming or in receipt of weekly payments of compensation under this Scheme." It will be observed that those provisions which are intended to be referred to are not identified by their notation. Para. 12 of the Scheme of 1928—No. 975 of 1928—had indicated by notation the sections referred to, but para. 11 of the 1931 Scheme refers to them not by their notation but by reference to the subject-matter to which the provisions of the Act relate—namely, submissions to medical examination and the like. That paragraph contains a proviso which is important for the purpose of the interpretation of the proviso in the Preamble. It says that any reference required to be made to a medical referee under the said provisions shall be made to the Medical Board. That proviso would have been unnecessary if a wider interpretation had been given to the exception contained in the Preamble. Construing that exception in the Preamble as relating to the initial examination and certification by the certifying surgeon and medical referee, it became necessary to provide, in regard to a reference made to a medical referee under s. 19, that the medical referee's duties should be discharged by the Medical Board. But, after considering para. 11 of Scheme No. 342 with great care, we have come to the conclusion that it cannot be said that the plan of the Act for examination following the procedure under s. 12 has not been maintained. It seems that para. 11 was intended to carry forward the system of the Act on this particular, and that the only alteration is that the medical referee is displaced by the Medical Board.

Having come to that conclusion, I now turn to consider what is the effect of the decision of the Medical Board on October 21. It stands in the place of a decision of a medical referee, but there had been no preliminary examination by a medical practitioner which could be submitted on appeal to a medical referee. The procedure which had been adopted by the employers in going straight to the medical referee was founded upon a mistake in that they did not fulfil the conditions preliminary to going before a medical referee. In these circumstances it does not appear possible to treat the decision of the Medical Board as final and conclusive, certainly not as ousting the jurisdiction of the county court judge. For these reasons it appears that the county court judge, placed in the great difficulty that he was, has acted too quickly, and the matter must go back to him to re-try. He will be able to consider, just as in *Pudney* v. *France, Fenwick & Co.* (1),

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(1) [1925] 1 K. B. 346.

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whether or not the procedure under s. 12 of the Act deprived a workman of the right to bring arbitration proceedings, and whether the workman was entitled to bring arbitration proceedings, and the employers will be entitled, if the facts justify them, to ask for a review; also they can place before the county court judge any contention in regard to the force of the finding by the Medical Board on the facts relating to the workman's submission to the Board, and can also contend that the finding of the Board was properly proved by the evidence placed before them. As to the ultimate decision which the county court judge will reach, I prefer to say no more. All possible points have been raised before us, and on no point is Mr. Cave shut out, as none of the points argued by him has been decided. The matter will go back to the county court judge for his determination, and I desire only to say that, by reason of the preliminary steps not having been complied with, it is not possible to treat the decision of the Medical Board on October 21 as final and conclusive, or as ousting the jurisdiction.

In the circumstances, however, for the reasons I have mentioned, there will be no costs of this appeal, and the costs of the re-hearing will, of course, be within the discretion of the county court judge, who will also have left in his discretion the costs relating to the hearing before him from which this appeal is brought.

Lawrence L.J. I agree. The question in this case is whether the certificate of the Medical Board given in pursuance of para. 9 of the General Scheme of 1931, S. R. & O. No. 341, was validly given. Para. 5 of that Scheme provides that: "any certificate given by the Medical Board in pursuance of the provisions of this Scheme shall be conclusive evidence of the matters thereby certified." The certificate in question certified that the workman in the present case was no longer totally disabled from silicosis or asbestosis, or either of those diseases accompanied by tuberculosis, within the meaning of para. 4 of the Silicosis Scheme, 1928, S. R. & O. No. 975. Mr. Dale contended that para. 9 of the Scheme, S. R. & O.

No. 341, did not apply to this workman, as he had previously obtained a certificate of total disablement under the Silicosis Scheme, S. R. & O. No. 975, which latter Scheme expressly incorporated ss. 8 to 13 and ss. 17 to 20 of the Workmen's Compensation Act, 1925; and that therefore the workman's right to compensation was safeguarded by the provisions of those sections, and more particularly by ss. 12, 18 and 19 of that Act; and moreover that the workman had a right to avail himself of s. 9, sub-s. 4, which is now superseded by s. 1 of the Act of 1931, if he could bring himself within the provisions of that section. The solution of the question thus raised depends upon the true effect of the Scheme S. R. & O. No. 341, and the Silicosis Scheme of 1931, S. R. & O. No. 342, and is in my opinion rendered extremely difficult by reason of the obscure wording of the latter Scheme. One of the main objects of the Scheme S. R. & O. No. 341, which was made under the powers conferred on the Secretary of State by s. 2 of the Act of 1930, was to co-ordinate the medical arrangements in connection with the various Compensation Schemes applicable to all industries and processes, cr groups of industries and processes. The Silicosis Scheme, S. R. & O. No. 342, provides that in a case like the present the Scheme of 1928, S. R. & O. No. 975, was to continue to apply to any of the processes specified in para. 2 of that Scheme, except that the provisions of the Scheme S. R. & O. No. 342 as to examination and certification by the Medical Board should be substituted for the provisions in the Scheme S. R. & O. No. 975 as to examination and certification by the certifying surgeon and medical referee.

The question which naturally presents itself to one's mind is which of the provisions in the 1928 Scheme had been superseded and are no longer operative, and which of the provisions in the 1931 Scheme, S. R. & O. No. 342, are now to be considered as being incorporated in the Scheme S. R. & O. No. 975. The first matter to be observed is that the 1928 Scheme is to continue to apply, that is to say, is to remain in full force and effect; secondly, that the only provisions of that Scheme for which other provisions are to be substituted are provisions as to the examination and the certification by the certifying surgeon and medical referee. I read those latter words in a conjunctive sense, that is to say, where you find provisions under which the certifying surgeon and medical referee both have something to do with the examination and certification, then those provisions are to be cancelled and the other provisions are to be substituted. Turning to the 1928 Scheme, I think that the provisions referred to are the provisions contained in Part I. headed "Right to Compensation" (paras. 4 to 9 inclusive), and that the provisions in the Scheme S. R. & O. No. 342 which are to take the place of those provisions are those contained in Part I. headed "Right to Compensation" (paras. 4 to 8 inclusive). Speaking for myself I do not agree with the construction submitted by both Mr. Dale and Mr. Cave, that the Medical Board is substituted for the medical referee for the purposes of s. 19 of the Act; in my opinion that section is left unaffected by this Scheme.

Another matter which has to be noticed is that no new right is conferred by either of the recent Schemes upon an employer to apply to a medical referee or to a Medical Board, and certainly I cannot find anything in such Schemes which would justify the employer in applying to the Medical Board in a case like the present. When para. 9 of the Scheme S. R. & O. No. 341 is looked at, it will be seen that the only power which the Medical Board has to give a fresh certificate is when an application is made to it "in pursuance of any Compensation Scheme," which means that there must be a Compensation Scheme under which an application to the Board is justified, and unless there is such a justification the Board has no power to make an examination or give a fresh certificate. In my judgment, the broad contention of Mr. Dale on the whole case is well-founded, with the result that the employers were not justified in applying to the Medical Board and in that way depriving the workman of the safeguards which he had under the Act, and especially of the right to prevent the employers from discontinuing the weekly payments without complying with the necessary preliminaries under the Act. The effect of the learned county court judge's decision in the present case is bodily to take out of the Scheme of 1928 the provisions incorporating the sections of the Act to which I have referred, and this in my opinion is not the true effect of the recent Scheme.

I desire to guard myself against it being thought by what I have said that I had decided that s. 9, sub-s. 4, as amended by s. 1 of the Act of 1931 would apply to the case of an industrial disease such as silicosis. That question will in my opinion have to receive careful consideration if and when it arises, and I need say no more about it on the present occasion.

In the result I agree with the Master of the Rolls that this case should go back to the county court judge for reconsideration.

SLESSER L.J. I agree that this appeal should be allowed in the terms that have been stated by the Master of the Rolls. I approach the problem from this angle. I ask myself whether any subsequent legislation or any subsequent Scheme has deprived the appellant workman of the rights conferred and obligations imposed upon him by the original Scheme under which he was certified—namely, the Scheme No. 975 of 1928. He was given a certificate under para. 4, sub-para. 1, of that Scheme, and that, on appeal to the medical referee, was confirmed under para. 6 of that same Scheme. Were there no further Scheme or legislation to affect the position it would be clear that under that Scheme there would be only two ways in which the employers could properly stop the compensation to which he became entitled on obtaining a certificate under the Scheme in accordance with the terms of s. 47 of the Act of 1925. The one would be by employing the processes indicated in ss. 12, 18 and 19 of the principal Act, all of which are incorporated in the 1928 Scheme by paras. 10 and 12, and the other method would be by bringing arbitration proceedings for a review, as was decided in *Pudney's* case. (1) Therefore it is quite clear that no application could be made directly to the medical referee, because an application to the medical referee under para. 15 would only follow on an application that the man should first be examined by the medical practitioner provided by the employer under s. 18, and in no event could he have been required to be examined by a Medical Board, because no Medical Board for such a purpose then existed.

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(1) [1925] 1 K. B. 346.

The Workmen's Compensation (Silicosis and Asbestosis) Act, 1930, was subsequently passed, which extended by s. 2 the power of the Secretary of State under s. 47 of the Workmen's Compensation Act, 1925, to make a General Scheme applicable to all industries and processes for the purpose of co-ordinating the medical arrangements; and in accordance with that power the Secretary of State duly made the Scheme No. 341 dated April 30, 1931. At that time the appellant workman had already got a certificate under Scheme No. 975 of 1928, which he had obtained on September 30, 1930. In my opinion Scheme No. 341 has not been effectively applied to the case of the present appellant workman, and for this reason: it is a Scheme in general terms, resembling perhaps to some extent the provisions of the Lands Clauses Consolidation Act, and it provides by para. 9 for a certificate by the Medical Board "where in pursuance of any Compensation Scheme application is made to the Medical Board for a re-examination," and by para. 5 that the decision of the Medical Board shall be final. It does not itself give power to apply to a Medical Board, but merely provides what is to happen where in pursuance of any Compensation Scheme such an application can be made.

Therefore, seeing that there is no power to apply to a Medical Board in the Scheme of 1928, the employers are driven to seek that power in some other Scheme, and they seek to find it in Scheme No. 342 of 1931. That Scheme in terms limits the extent to which it is intended to affect Scheme No. 975 of 1928, because the Preamble, after first providing that the Scheme No. 342 shall come into force on June 1, 1931, in substitution for the Scheme of 1928, goes on to say: "Provided that the Various Industries (Silicosis)

Scheme, 1928, as so amended"—the amendment is not material here—" shall continue to apply in cases of workmen who have been employed on or after the 1st January, 1929, in any of the processes specified in paragraph 2 of that Scheme as so amended, but are not entitled to claim compensation under this Scheme." It is clear, therefore, that, although the new Scheme, No. 342, has come into operation, it has been expressly provided that the Scheme of 1928, under which this workman received his certificate, should continue to be in force as regards such a workman as he was.

There follows, however, an exception, and if that exception applies, then this workman, notwithstanding that general proviso, is not any longer within the Scheme of 1928. In my view it is clear, when the exception is considered, that it has only relation, as it states, to examination and certification by the Medical Board being substituted for the provisions in the 1928 Scheme as to examination and certification by the certifying surgeon and medical referee. That, as Lawrence L.J. has pointed out, can only refer to the earlier part of the 1928 Scheme dealing with the initial right to compensation. It is, in my view, impossible to read the words " examination and certification by the certifying surgeon and medical referee," which clearly refer to the machinery of certification and the appeal from the certifying surgeon to the medical referee, as having application to any function of the medical referee which does not arise on appeal from the certifying surgeon. As my Lord has pointed out, that view, which I think is clear on the face of the exception to the proviso, is made even more clear, if necessary, by reference to para. 11 of Scheme No. 342 of 1931, which in terms provided : " That any reference required to be made to a medical referee under the said provisions"—that is the provisions of the Act relating to submission to medical examination—" shall be made to the Medical Board," a provision which would be otiose if it was included in the original exception. Therefore, in my view, Scheme No. 342, by keeping alive the Scheme of 1928 in cases such as the present one and by failing to except from that Scheme the method of dealing with the workman as regards continuance of the payment of compensation after he has been certified, has no application to this case at all; and if that be so, it follows that where in No. 341 of 1931 para. 9 provides for re-examination of a workman on application "in pursuance of any Compensation Scheme" that also can have no effect here, because the workman is not affected by any Compensation Scheme under which application can be made to the Medical Board. The only applications which the employers can make in his case are either to the Court or through the machinery of ss. 12, 18 and 19 of the principal Act.

In these circumstances, I think, not only that this appeal must succeed, but I cannot agree with Mr. Dale when he seems to suggest that an appeal under s. 19, or rather under the substituted para. 12 of the 1928 Scheme, would go to the Medical Board. If the provision in s. 19 of the Act be used in cases where the 1928 Scheme is applicable, the appeal would still go in my view to the medical referee and not to the Medical Board, because I do not think any jurisdiction has been conferred on the Medical Board to deal with the matter at that stage. That matter, however, does not really arise for consideration.

I would only add that I agree respectfully with Lawrence L.J. that it may be a matter for consideration at some subsequent stage whether s. 1 of the Act of 1931, which amends sub-s. 4 of s. 9 of the 1925 Act, applies to cases of silicosis. The argument is that even though a certificate be given that the workman is no longer totally disabled, yet that under that section a notional total disablement may be inferred if the workman satisfies the conditions of that section. I think there are grave difficulties in the way of that argument, seeing that in the case of silicosis total disablement is necessary to bring the workman within the Act. But that no doubt is a matter which will fall to be considered when the proper occasion arises. For the moment it is sufficient to say that I think this workman still falls within the Scheme of 1928, that he has all the rights which the Scheme of 1928 gives him, either to proceed by arbitration or to proceed by the machinery of ss. 12, 18 and 19 of the Act, and that no further legislation or regulation has altered that right. That being so, in my opinion the learned county court judge has come to a wrong conclusion in holding that the Medical Board has ousted his jurisdiction. The appeal, therefore, must be allowed.

Appeal allowed.

Solicitors: *Stow, Preston & Lyttelton, for Hollinshead & Moody, Tunstall; Orgill & Llewellyn, for Llewellyn & Son, Tunstall.*

H. C. G.

MONTAGU STANLEY AND COMPANY *v.* J. C. SOLOMON, LIMITED.

[1932. M. 314.]

C. A.
1932
May 4, 5.

Principal and Agent—Agreement to share Commissions and Losses on Stock Exchange—Indemnity—Del credere Agency.

By an agreement in writing between the plaintiffs, who were stockbrokers and members of the Stock Exchange, and the defendants, who were also stockbrokers but not members of the Stock Exchange, the latter agreed that in consideration of receiving 50 per cent. of any commission on business introduced by them to the plaintiffs they would be liable for 50 per cent. of any "loss sustained" by the plaintiffs in connection with such business. The defendants introduced to the plaintiffs one W., and as a result of his transactions he incurred a debt to the plaintiffs, no part of which had been paid. W. executed a deed of assignment of his property for the benefit of his creditors, and both the plaintiffs and the defendants were assenting creditors to the deed. The plaintiffs claimed that on the execution of that deed of assignment a loss had been sustained by them within the meaning of the abovementioned agreement, and they brought an action to recover 50 per cent. of W.'s debt:—

Held, that the mere signing of the deed of assignment by W. did not establish a loss sustained by the plaintiffs, and that in the absence of evidence of actual loss sustained by them the action failed.

Decision of Horridge J. [1932] 1 K. B. 611 affirmed.

APPEAL from a decision of Horridge J.

The plaintiffs, Montagu Stanley & Co., were stockbrokers and members of the Stock Exchange, and the defendants,

J. C. Solomon, Ld., were also stockbrokers, but not members of the Stock Exchange. By a letter dated April 7, 1930, the defendants wrote to the plaintiffs in these terms: "In consideration of your paying to J. C. Solomon, Ld. [the defendants], 50 per cent. of any commission received on business introduced by them as agents, it is hereby agreed that the company [the defendants] shall be liable to you for 50 per cent. of any loss sustained by you in connection with such business." In pursuance of this agreement the defendants introduced Colonel Sofer Whitburn to the plaintiffs, and as a result of their transactions with him the latter owed them a sum of 5544*l*. 8*s*. 5*d*., no part of which was paid. On July 30, 1931, Colonel Sofer Whitburn executed a deed of assignment for the benefit of certain of his creditors, both the plaintiffs and the defendants being parties to the deed as assenting creditors. The plaintiffs thereupon claimed 2772*l*. 4*s*. 2*d*., being 50 per cent. of the above sum of 5544*l*. 8*s*. 5*d*., as being "loss sustained" within the meaning of the letter of April 7, 1930, contending that this was a contract in the nature of a del credere agency. The defendants contended that the contract was one of indemnity, and that the amount of the "loss sustained" would not be ascertained until it was known what (if anything) would be received by the plaintiffs under the deed of assignment of July 30, 1931.

Horridge J. held that the agreement was one of indemnity, and was not one in the nature of a del credere agency, and that in the absence of evidence of actual loss sustained by the plaintiffs after taking into consideration the value of their rights under the assignment their claim failed.

The plaintiffs appealed.

Hilbery K.C. and *W. N. Stable* for the appellants. Horridge J. was wrong in holding that the defendants were not liable. When a person says he cannot pay his debt—and that is what Colonel Sofer Whitburn said when he executed the deed of assignment—there is a loss of the whole sum, because the creditor—in this case the plaintiffs—is kept out of his money.

Over the arrangement between the parties as embodied in the letter of April 7, 1930, the del credere principle is writ large, the obvious intention being that the plaintiffs' position should be guaranteed up to half the amount of the loss. It is said on the other side that the appellants may get a dividend under the deed of assignment, but if they do receive one the amount will be in the nature of salvage, half of which the plaintiffs will have to hand over to the defendants: see per Lord Blackburn in *Burnand* v. *Rodocanachi*. (1) That, however, does not affect the fact that there was a "loss sustained" on the signing of the deed of assignment. The Scottish case of *Willison* v. *Ferguson* (2) is exactly in point. There it was held that a "loss" was sustained where a debt, in spite of pressure, was not paid when it became due, and the company had gone into liquidation.

[They also referred to *Sutton & Co.* v. *Grey* (3); *Thomas Gabriel & Sons* v. *Churchill & Sim* (4); and *Holmes* v. *Payne*. (5)]

Pritt K.C. and *H. C. Marks* for the respondents were not called upon.

SCRUTTON L.J. In this case the plaintiffs, who are members of the Stock Exchange, claim against the defendants, who are half commission men, under a written agreement, so that there is no difficulty about the words used, and there is no evidence as to any custom of the Stock Exchange as to the relations between the principals and the half commission agents. I say this because in *Sutton & Co.* v. *Grey* (3) the terms of the agreement there in question were slightly different from those in the present case. The agreement with which we are here concerned, contained in the letter written by the defendants to the plaintiffs, says: "In consideration of your paying . . . . 50 per cent. of any commission received on business introduced by [the defendants] as agents, it is hereby agreed that [the defendants] shall be liable to you for 50 per cent. of any loss sustained by you in connection with such business," whereas in *Sutton & Co.* v. *Grey* (1) the agreement spoke of commission "earned by the plaintiffs"—not "received"—and "loss which might be incurred by the plaintiffs," which may or may not be the same thing. Here the plaintiffs rest their claim simply on the agreement; they gave no evidence. As to the facts, they are these: the defendants introduced Colonel Sofer Whitburn to the plaintiffs, and he speculated on the Stock Exchange and ran up a debt to the plaintiffs of a very large amount. He owed money to a great number of persons: so that the introduction of this gentleman was obviously not very fortunate. He owed a sum of over 5000*l.* to the plaintiffs on his speculations, and the plaintiffs say that he ought to have paid this amount but did not, and on July 30, 1931, executed a deed of assignment, as a result of which, say the plaintiffs, there was a total loss sustained by them within the meaning of the agreement. I put this to Mr. Hilbery: suppose Colonel Sofer Whitburn ought to have paid on July 1, but did not pay on that date, was there a total loss then? Mr. Hilbery at first said "No," but afterwards was inclined to think that he had gone too far. What the defendants say to the plaintiffs is: "Prove that you have sustained a loss; you have assented to the deed of assignment from which you may ultimately get your money; you have in fact agreed to a kind of moratorium." It appears that Colonel Sofer Whitburn derives part of his income under a discretionary trust, and the deed of assignment provides that, after paying certain sums to him and various charges, the trustees shall "pay the assenting creditors the amounts of their debts but in case of a deficiency rateably in proportion to the amounts of their respective debts. . . . ." The deed, say the defendants, contemplates that the plaintiffs may be paid in full. Horridge J. has taken the view that in the absence of evidence of any specific loss, such as they might have had to pay in respect of the speculative transactions entered into by Colonel Sofer Whitburn, the plaintiffs have not proved that they

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(1) (1882) 7 App. Cas. 333, 339.
(2) (1901) 9 Sc. L. T. 169.
(3) [1894] 1 Q. B. 285.
(4) [1914] 3 K. B. 1272.
(5) [1930] 2 K. B. 301.

(1) [1894] 1 Q. B. 285.

have sustained a loss, and I agree with him. Their claim must therefore be deferred till a loss is proved. The execution of the deed of assignment is not sufficient proof of loss to entitle them to succeed. The appeal must be dismissed.

GREER L.J. Many cases come to this Court where the proposition of law may be in doubt and upon which there may be a good deal to say on each side, but as to which when judgment is given the rule of law is definitely established. But there are two rules of law upon which I have never heard doubt thrown: the first is that if a person relies upon a contract which he alleges has been broken he must prove it; and secondly, that in interpreting the contract the ordinary meaning of the words used must be given to them, unless some special meaning is proved by reason of custom or otherwise. In the present case the words of the contract are perfectly plain and clear. The parties might have provided that, inasmuch as this was an operation for half commission, each of them would provide half the necessary capital to continue the business out of which the commission should arise. They did not make such a provision. The providing of money to get Colonel Sofer Whitburn's speculations through was put upon one of the parties and not upon the other. The defendants, as the introducers of the client, were under no obligation to find any part of the capital for the purpose of keeping the speculations going. All that was agreed was that the defendants would be liable to the plaintiffs for 50 per cent. of any loss sustained by them. Two points of time were put forward by the plaintiffs as the dates on which they say a loss was sustained by them, first, the date of the payment becoming due from the client to them as brokers and the payment not being made. That seems to me to be unarguable. Many debtors fail to pay on the due date, but it cannot be said that the money not then paid is lost money. Secondly, it is said that the date when the loss was sustained was that on which the deed of July 30, 1931, was executed. What the plaintiffs thereby took was not something of no value but was something that was regarded by them as of more value than the right to sue the debtor. It is impossible to say that, because the money debt has been converted by the creditor into the acceptance of something valuable, the whole debt has thereby been lost, that is to say, that there has been a complete loss of the amount of the money owing. Assume that the brokers had accepted from the client, in place of their debt, the client's house or other property which might not be saleable at the moment but would be saleable at some future time with a reasonable expectation of reducing the amount of the debt. Could it be said that at the date on which the property was accepted in exchange for the debt there had been a loss sustained of the total amount of the debt? To me it seems quite impossible. Although it is not necessary in this case to decide the point, I think that if the result of what has happened is that the plaintiffs have to give up any interest on their money for a long time, the loss of that interest might be a "loss sustained" in connection with the business and might give a right to recover it. That, however, is not the case with which we are concerned. The plaintiffs say they have lost the whole amount of the debt. My difficulty has been to appreciate that such a point is arguable. Horridge J. was obviously right, and the appeal must therefore be dismissed.

SLESSER L.J. I agree. The agreement under consideration is in two parts, first, an obligation by the plaintiffs to pay to the defendants 50 per cent. of the commission received on business introduced by the defendants. So far it is an ordinary agency agreement. Then there is a second limb which says that the defendants shall be liable for 50 per cent. of any loss sustained by the plaintiffs. It is not an express agreement to answer for the debt of another but an agreement to indemnify against loss which may occur. That being so, it is incumbent on the plaintiffs to show that a loss has been sustained in connection with the business. No attempt was made to prove such a loss, no evidence being adduced. The plaintiffs rely on the execution of the deed of assignment by Colonel Sofer Whitburn to show that there has been a total loss; but we do not know that under the terms of that deed the whole or a great part of the money may not yet be obtained. All these matters are left in complete obscurity, and the plaintiffs have failed to show any present loss sustained by them under the agreement. The condition of liability not having been satisfied the claim fails and the appeal must be dismissed.

Appeal dismissed.

Solicitors for appellants: *Harris, Chetham & Cohen.*
Solicitors for respondents: *Wild, Collins & Crosse.*

J. S. H.

HAMPTON v. WEST CANNOCK COLLIERY COMPANY, LIMITED.

1932
April 8.

Coal Mine—Checkweigher—Removal—Interfering with the Management of the Mine—Unlawful Act—Coal Mines Regulation Act, 1887 (50 & 51 *Vict.* c. 58), *s.* 13.

By s. 13, sub-ss. 4 and 5, of the Coal Mines Regulation Act, 1887, it is provided that on the complaint of the owner agent or manager of a mine, a court of summary jurisdiction may order the removal of a checkweigher on the ground (inter alia) that he has "interfered . . . . with the management of the mine."

A checkweigher at a certain pit was also secretary of the local branch of the miners' union of which the men employed at that pit were members. It had been the custom of the district to work a short shift on a Saturday. The colliery gave notice that a full shift would in future be worked at that pit on a Saturday instead of a short shift. The checkweigher tried to persuade the managers of the colliery to work only a short shift on Saturdays. On the Friday he chalked on the pavements in the neighbourhood of the colliery words to the effect that the workmen at that pit had decided at a mass meeting not to work on Saturday unless a short shift should be worked. On Saturday a number of miners assembled at the pit in their pit clothes with their water bottles filled and day's food. After the checkweigher had been told by the manager that the mine would work a full shift instead of a short shift, he went to the men and said: "It's a full shift. Come on, lads," and walked away, and the men did the same and did not work that day:—

Held, that there was evidence upon which the justices were entitled to come to the conclusion that the checkweigher had interfered with

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the management of the mine contrary to the provisions of s. 13 of the Coal Mines Regulation Act, 1887, and to make an order removing him from his office of checkweigher.

Per Avory J. It was sufficient that the act of the checkweigher did in fact interfere with the management of the mine. It was not necessary that the act should be unlawful either as being in breach of some statute or unlawful according to the common law.

Observations by Avory J. upon dicta of Kennedy J. in *Sykes* v. *Barraclough* [1904] 2 K. B. 675, 679, and Swinfen Eady L.J. in *Date* v. *Gas Coal Collieries, Ld.* [1915] 2 K. B. 454, 460.

CASE stated by justices for the county of Stafford.

At a court of summary jurisdiction sitting at Rugeley complaint was preferred by the West Cannock Colliery Company, Ld., and William Henry Allen, their manager (hereinafter called "the respondents"), under the Coal Mines Acts, 1887 to 1930 (1), against Joseph Hampton (hereinafter called "the appellant"), for that he, being a checkweigher at the No. 5 pit or mine of the West Cannock Colliery Company at Brindley

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(1) Coal Mines Regulation Act, 1887, s. 13, sub-s. 1: "The persons who are employed in a mine, and are paid according to the weight of the mineral gotten by them, may, at their own cost, station a person (in this Act referred to as a 'check weigher') at each place appointed for the weighing of the mineral, and at each place appointed for determining the deductions in order that he may on behalf of the persons by whom he is so stationed take a correct account of the weight of the mineral or determine correctly the deductions as the case may be."

Sub-s. 3: "A checkweigher shall not be authorised in any way to impede or interrupt the working of the mine, or to interfere with the weighing, or with any of the workmen or with the management of the mine; . . . ."

Sub-s. 4: "If the owner agent or manager of the mine desires the removal of a checkweigher on the ground that the checkweigher has impeded or interrupted the working of the mine, or interfered with the weighing, or with any of the workmen, or with the management of the mine, or has at the mine to the detriment of the owner agent or manager done anything beyond taking such account determining such deductions or giving such information as aforesaid, he may complain to a court of summary jurisdiction, who, if of opinion that the owner agent or manager shows sufficient prima facie ground for the removal of the checkweigher, shall call on the checkweigher to show cause against his removal."

Sub-s. 5: "On the hearing of the case the court shall hear the parties, and, if they think that at the hearing sufficient ground is shown by the owner agent or manager to justify the removal of the checkweigher, shall make a summary order for his removal, and the checkweigher shall thereupon be removed, but without prejudice to the stationing of another checkweigher in his place."

Heath in the parish of Brereton in the county of Stafford, on the tenth and eleventh days of April, 1931, unlawfully did interfere with the management of the said mine, and praying that the said Joseph Hampton might be called on to show cause why he should not be removed from his office as a checkweigher at the said mine, which complaint was heard by the justices on June 11, 1931, when they found that the appellant had unlawfully interfered with the management of the mine contrary to the provisions of the said Acts, and ordered that he should be removed from his office as a checkweigher at the said mine.

The appellant being dissatisfied with the said determination as being erroneous in point of law, duly applied to the justices to state a case for the opinion of the High Court, and the justices in compliance with such application stated and signed the following case.

Upon the hearing of the complaint the following facts were proved or admitted:—

(1.) The appellant was on April 10 and 11, 1931, a checkweigher employed at the No. 5 pit or mine of the West Cannock Colliery Company situate at Brindley Heath.

(2.) The appellant, in addition to being a checkweigher, was secretary of the local branch of the miners' union of which the men employed at No. 5 pit were members.

(3.) On April 1, 1931, a notice was posted up by the respondents at the said No. 5 pit containing the following words and figures:—

"No. 5 Pit.

Monday to Saturday.

Until further notice the time of lowering and raising men at this pit will be as follows:—

	Lowering.		Raising.	
	To Commence.	To be Completed.	To Commence.	To be Completed.
Day	6.55 A.M.	7.30 A.M.	3 P.M.	3.35 P.M."

(4.) It had been the custom of Cannock Chase to work a short shift on a Saturday for many years, but that on a previous occasion (in March, 1929) a full shift had been worked on a Saturday.

(5.) On April 8 and 10, 1931, conversations took place between the appellant and the respondents' assistant agent and their certified manager at which the latter explained to the appellant the respondents' reasons for working a full shift of 7½ hours on Saturday, April 11, 1931, and the appellant tried to persuade the respondents' assistant agent and their certified manager to work only a three-quarter shift on such Saturday, but the latter would not agree to this.

(6.) On Friday, April 10, 1931, the appellant chalked on pavements in the neighbourhood of the colliery words to the effect that the workmen at No. 5 pit had decided at a mass meeting not to work on Saturday unless a three-quarter shift should be worked.

(7.) On Saturday, April 11, 1931, at 6.45 A.M. about 400 miners in pit clothes with their water bottles filled and day's food were at No. 5 pit, and after the respondent Allen had told him that the mine would work a full shift instead of a three-quarter shift the appellant went to them and said: "It's a full shift. Come on, lads," and walked away, and the men did the same and did not work at all that day.

(8.) A full shift of 7½ hours was worked on Saturday, April 11, 1931, at the respondents' other four pits.

On the part of the appellant it was asserted and contended:—

(*a*) that he persuaded the men to attend at No. 5 pit on Saturday, April 11, 1931, on the chance that the management might at the last moment be persuaded to work a three-quarter shift only;

(*b*) that at a mass meeting of the men a resolution was passed that the men should work on Saturday only if the management allowed them to work the usual short shift;

(*c*) that at the said meeting the appellant told the men that they must decide the matter themselves, and that he would take no responsibility for their decision;

(*d*) that there was no evidence that the appellant had interfered with the working of the colliery.

On the part of the respondents it was asserted and contended :—

(*a*) That the appellant had at interviews with Mr. Archie Robert Latham (respondents' assistant agent) and Mr. Allen (one of the respondents) on April 10, 1931, actually threatened to prevent a full shift being worked at No. 5 pit on Saturday, April 11, 1931 ;

(*b*) that there was ample evidence of interference by the appellant in the working of the colliery.

The attention of the justices was directed to the following decision—namely, *Sykes* v. *Barraclough*. (1)

The justices being of opinion that there was evidence that the appellant had unlawfully interfered with the management of the mine on April 10 and 11, 1931, made an order dismissing him from the post of checkweigher.

The question upon which the opinion of the Court was desired was whether upon the above statement of facts the justices came to a correct determination and decision in point of law.

Joy K.C. and *H. H. Maddocks* for the appellant. The decision of the justices removing the appellant from his office of checkweigher in this mine was erroneous. The appellant besides being a checkweigher was also the secretary of the local branch of the miners' union to which the miners employed in the pit belonged. The acts of the appellant complained of were done by him in his capacity of secretary of the local branch of the miners' union and not in his capacity as checkweigher. If the act of interference with the management or working of the mine was done by the appellant in another capacity and not in his capacity as checkweigher it is not a ground for removing him from his office as checkweigher. In *Prentice* v. *Hall* (2) Mellor J. said that the checkweigher "was using his position as checkweigher as an opportunity for intimidating a workman ; such a proceeding

(1) [1904] 2 K. B. 675.

(2) (1878) 37 L. T. 605, 607 ; 26 W. R. 237.

comes within the very words of the section, as tending to impede the working of the mine"; and Lush J. said: "The essence of the offence is the use of his position" as checkweigher. In *Sykes* v. *Barraclough* Kennedy J. said (1): "I should by no means be prepared to justify an order of magistrates removing a checkweigher from his place, merely because either as an official of a miners' association or as a private individual the checkweigher took some part in the legitimate work of a miners' association, and was present or spoke or presided at meetings called together to consider and resolve upon matters affecting the miners' interests or action. It is true that such action may be intended to influence and may influence the conduct of workmen at the mine; but I should not be prepared to hold, nor must I be understood to hold here, that action of that kind is necessarily interference within the meaning of the section. I do not believe that this was the purpose of the enactment in question." In *Date* v. *Gas Coal Collieries, Ld.* (2), it was held that a person who holds the appointment of checkweigher at a mine is not thereby disqualified from being appointed to make, and from making inspections of the mine under s. 16 of the Coal Mines Act, 1911. It therefore follows that there may be acts of a checkweigher which may interfere with the management of a mine but which will not justify his removal from his office of checkweigher on that ground. Swinfen Eady L.J. said (3): "It was urged, however, that the duties of an inspector must necessarily involve some interference with the management of a mine, and that s. 13, sub-s. 3, of the Act of 1887 contains an express prohibition against a checkweigher's interference; but in my opinion this sub-section cannot be construed as applying to occasions when the person is acting in some capacity other than that of checkweigher." Those two dicta lend strong support to the contention put forward on behalf of the present appellant. The Coal Mines Regulation Act of 1887 does not prevent checkweighers having the ordinary rights of individuals. Secondly, if the

(1) [1904] 2 K. B. 675, 679.
(2) [1915] 2 K. B. 454.
(3) [1915] 2 K. B. 460.

decision in *Sykes* v. *Barraclough* (1) is conclusive against the first contention, the acts done by the appellant were not in themselves unlawful. In order to come within the purview of the Act of 1887 the acts must be done by the checkweigher in his capacity as checkweigher or they must be in themselves unlawful. In the present case the act done by the appellant was a perfectly lawful act—namely, communicating the decision of the miners not to work a full shift on Saturdays to the manager of the mine: that was not interference with the management of the mine. In *Prentice* v. *Hall* (2), on the other hand, the checkweigher intimidated a banksman to compel him to abstain from working in the employment of the colliery. In *Sykes* v. *Barraclough* (1) the checkweigher said that he would stop play-day working either by fair or foul means. In *Ex parte White* (3) the checkweigher gave certain information and advice to the men while in the mine as to the hours of working. In all these cases the acts were held to amount to interference with the management of the mine.

[LORD HEWART C.J. referred to the judgment of Lord James of Hereford in *Allen* v. *Flood* (4) as to what amount of interference would constitute a cause of action.]

In order that an act of a checkweigher should amount to an interference with the management of the mine it must be an act which would not be lawful when done by any individual.

Edgar Dale for the respondents was not called upon to argue.

LORD HEWART C.J. This is a case stated by justices, and it arises out of a complaint preferred by the respondents under the Coal Mines Acts, 1887 to 1930, against the appellant, for that he, being a checkweigher at the No. 5 pit or mine of the West Cannock Colliery Co. at Brindley Heath, on April 10 and 11, 1931, unlawfully did interfere with the management of the mine, and praying that the appellant might be called on to show cause why he should not be removed from his office as a checkweigher. That complaint was heard by the justices on June 11, when the justices found that the appellant had unlawfully interfered with the management of the mine contrary to the provisions of the Act, and ordered that he should be removed from his office as checkweigher at the mine. The appellant appeals from that decision.

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(1) [1904] 2 K. B. 675.

(2) 37 L. T. 605; 26 W. R. 237.

(3) (1897) 13 Times L. R. 580.

(4) [1898] A. C. 1, 179.

Mr. Joy, in the course of an elaborate and, if I may say so, attractive argument, has directed our attention to four cases: *Prentice* v. *Hall* (1); *Sykes* v. *Barraclough* (2); *Date* v. *Gas Coal Collieries, Ld.* (3); and *Ex parte White.* (4) Speaking for myself, I do not observe any such difference between these decisions as has been suggested, and I think the only question for us in this case is whether there was any evidence upon which the justices were entitled to come to the opinion to which undoubtedly they came.

The facts are set out in the case, and it appears clearly that after conversations on April 8 and 10 the appellant on Friday, April 10, chalked on pavements in the neighbourhood of the colliery words to the effect that the workmen at No. 5 pit had decided at a mass meeting not to work on Saturday unless a three-quarter shift should be worked; and that on Saturday, April 11, "about 400 miners in pit clothes with their water bottles filled and day's food were at No. 5 pit, and after the respondent Allen had told him that the mine would work a full shift instead of a three-quarter shift the appellant went to them and said: 'It's a full shift. Come on, lads,' and walked away, and the men did the same and did not work at all that day." I am not prepared to say that, those materials being before the justices, there was not evidence upon which they were entitled to find as they did. I accordingly think that this appeal fails.

AVORY J. I agree that in this case, upon the facts found, there was evidence upon which the justices could properly convict the appellant under s. 13 of the Coal Mines Regulation Act, 1887. It is necessary, I think, to observe the exact words of that statute in view of the argument which has been addressed to us. Sect. 13, sub-s. 3, provides as follows:

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(1) 37 L. T. 605; 26 W. R. 237.

(2) [1904] 2 K. B. 675.

(3) [1915] 2 K. B. 454.

(4) 13 Times L. R. 580.

"A checkweigher shall not be authorised in any way to impede or interrupt the working of the mine, or to interfere with the weighing, or with any of the workmen or with the management of the mine." Mr. Joy has taken two points: firstly, that what was done in this case by the appellant was not done by him qua checkweigher, but was done by him qua secretary of the local branch of the miners' union, of which the men employed at this pit were members. Mr. Joy also says that if he is precluded from relying upon that point in consequence of the decision in *Sykes* v. *Barraclough* (1), his second point is that what was done was something that was not unlawful; whether the word is used in the sense of not unlawful because it is not in breach of any statute or not in breach of the common law, it is difficult quite to understand. Now in my opinion the first point is not open in view of the decision in *Sykes* v. *Barraclough* (1); that is to say, that it is not open to the appellant to say that in what he did he was not acting qua checkweigher.

Reliance has been placed by Mr. Joy upon a passage in the judgment of Kennedy J., as he then was, in *Sykes* v. *Barraclough* (2), which is in these words: "I desire, for my part, to say that I should by no means be prepared to justify an order of magistrates removing a checkweigher from his place, merely because either as an official of a miners' association or as a private individual the checkweigher took some part in the legitimate work of a miners' association, and was present or spoke or presided at meetings called together to consider and resolve upon matters affecting the miners' interests or action." It appears to me that those words have no application to what was done by the appellant in this case. It is not suggested that he was an official of a miners' association taking part in the legitimate work of a miners' association, nor is it suggested that he was, in what he did, merely speaking or presiding at meetings called together to consider and resolve upon matters affecting the miners' interests or action. The passage in the judgment of the learned judge which appears to me to be directly

(1) [1904] 2 K. B. 675.

(2) [1904] 2 K. B. 679.

applicable to this case, and to this point—namely, that he was not doing what he did in his capacity as checkweigher, is to be found upon the same page of the report, where the learned judge said: "But I am equally convinced that the mere fact that the checkweigher charged with the unlawful interference is also an official of the local miners' association, and that the acts charged were done by him when purporting to act as such official, and not when claiming to use authority or perform duties as a checkweigher, does not necessarily constitute an answer to such a charge." The same view is, I think, apparent in the judgment of Bray J. in the case of *Date* v. *Gas Coal Collieries, Ld.* (1), which has been referred to particularly for a certain passage in the judgment of Swinfen Eady L.J., about which I will say a word in a moment. But in that case Bray J. (2) said this, referring to the Act which is now in question: "Sub-section 4 gives the owner of the mine power to appeal to a Court of summary jurisdiction for the removal of the checkweigher on certain specified grounds, and this has been held, and rightly held, to apply to the checkweigher's conduct when off duty as well as when on duty, because the words used are wide, and there is nothing to limit them to his conduct when on duty." He then proceeds to deal with the real point which arose in that case of *Date* v. *Gas Coal Collieries, Ld.* (1)—namely, whether there was anything in the two statutes which were in question to prohibit the checkweigher from being appointed an inspector. Bray J., on the following page, says (3) that the duty of the inspector is merely to inspect, and "that does not seem to me to involve any impeding or interruption of the working of the mine, or interference with the weighing, or with any of the workmen, or with the management of the mine within the meaning of sub-ss. 3 or 4 of s. 13 of the Act of 1887; nor does it entail any giving of information, or the doing of any act to the detriment of the owner, agent or manager of the mine within sub-s. 4. The mere fact that it is necessary for him to go down and come up the mine in order

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(1) [1915] 2 K. B. 454.
(2) [1915] 2 K. B. 463.
(3) [1915] 2 K. B. 464.

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to make his inspection need not impede the working of the mine." I only read that to show that in my opinion the decision of the Court in *Date* v. *Gas Coal Collieries, Ld.* (1), has really no application to the present case at all, and in my opinion the one observation which has been relied upon, made by Swinfen Eady L.J., must be read in view of the question which was then before the Court, and does not, in my opinion, and was never intended to, cover any such question as is now before the Court. He says (2): "It was urged, however, that the duties of an inspector must necessarily involve some interference with the management of a mine, and that s. 13, sub-s. 3, of the Act of 1887 contains an express prohibition against a checkweigher's interference; but in my opinion this sub-section cannot be construed as applying to occasions when the person is acting in some capacity other than that of checkweigher." In my view the learned Lord Justice was only there referring to the occasions upon which a person might be acting as an inspector, although he was at the same time a checkweigher, and Bray J., in his judgment, says that his duties as an inspector would not involve any interference with the management of the mine.

Now, in this case it was open to the justices to find that what the appellant did was something amounting to an interference with the management of the mine, and I see no ground in any of these cases for saying that what he did, if it did interfere with the management of the mine, must be something unlawful, either in the sense that it is in breach of some statute or that it is unlawful according to the common law. Therefore I think both points fail, and there is no ground for interfering with the decision at which the justices arrived.

HAWKE J. I agree.

Appeal dismissed.

Solicitors for appellant: *Sharpe, Pritchard & Co., for R. A. Willcock, Taylor & Co., Wolverhampton.*

Solicitors for respondents: *Johnson, Weatherall, Sturt & Hardy, for Parker Rhodes, Cockburn & Co., Rotherham.*

R. F. S.

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(1) [1915] 2 K. B. 454.

(2) [1915] 2 K. B. 460.

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April 19;
May 3.

SUTTON *v.* DORF.

Landlord and Tenant—Rent Restriction—Statutory Tenancy—Bankruptcy of Tenant—Tenancy whether "property" passing to Tenant's Trustee in Bankruptcy—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *ss.* 53, 167.

A statutory tenancy under the Rent Restriction Acts is not "property" of the statutory tenant within the meaning of s. 167 of the Bankruptcy Act, 1914, and, therefore, it does not pass to his trustee in bankruptcy under s. 63 of that Act, and is not extinguished on a disclaimer of it by the latter.

Parkinson v. *Noel* [1923] 1 K. B. 117 held overruled.

Keeves v. *Dean. Nunn* v. *Pellegrini* [1924] 1 K. B. 685; *Roe* v. *Russell* [1928] 2 K. B. 117; *Lovibond & Sons, Ld.* v. *Vincent* [1929] 1 K. B. 687; and *Skinner* v. *Geary* [1931] 2 K. B. 546, 558 applied.

APPEAL from Shoreditch County Court.

By an agreement dated March 25, 1916, Walter S. Sutton, as landlord, let, and the defendant, Louis Dorf, as tenant, took a house, No. 90 Osbaldeston Road, Stoke Newington, N., for the term of three years certain from March 25, 1916, at the clear yearly rent of 48*l.*, payable quarterly on the usual quarter days; and the defendant agreed not to assign or underlet the premises without the consent of the landlord first had and obtained, and to pay the rent reserved; and it was further agreed that unless the tenant gave notice three calendar months before the date on which the tenancy would determine of his intention to vacate the premises on that date, the tenancy should continue as a yearly tenancy on the same terms.

The defendant did not give that notice, and on the determination of the term of three years he continued in possession of the house on a yearly tenancy as a statutory tenant under the Rent Restriction Acts, subject to the payment of an increased yearly rent of 67*l.* 4*s.* On the death of Walter S. Sutton, the plaintiff, Florence M. Sutton, widow, became entitled to the reversion of the house immediately expectant on the determination of the defendant's tenancy thereof. On February 28, 1930, the defendant was adjudicated a bankrupt, and a trustee in bankruptcy of his estate was appointed. (1) The trustee gave a notice dated September 1, 1931, to the plaintiff as landlord of the house of his intention to disclaim the tenancy thereof. The plaintiff then requested the defendant to deliver up possession of the house to her, but he refused to do so.

On November 4, 1931, the plaintiff accordingly brought the present action against the defendant in the county court, alleging that by reason of the appointment of the trustee in bankruptcy of the estate and effects of the defendant, and the disclaimer of the statutory tenancy by the trustee, that tenancy had determined and the plaintiff was entitled to recover possession of the house, and that a sum which the defendant had purported to pay to her solicitors as rent from March 25, 1930, to December 25, 1930, had been paid on the mistaken footing that he was a statutory tenant of the house; and claiming possession of the house and payment of certain rent and mesne profits alleged to have accrued due since his bankruptcy from the defendant as tenant at will, or, alternatively, damages for alleged trespass upon the house and wrongful possession thereof by the defendant since his bankruptcy.

The defendant in his defence asserted that the tenancy did not vest in his trustee in bankruptcy, and that the latter had no right or authority to disclaim it; that the plaintiff was not entitled to possession of the house or to the rent, mesne profits, or damages claimed; and that, whilst denying all liability in respect of the plaintiff's claim, he brought into court 38*l.* 7*s.* 3*d.* in respect of rent from December 25, 1930,

(1) The Bankruptcy Act, 1914, provides:—

Sect. 53: "(1.) Until a trustee is appointed, the official receiver shall be the trustee for the purposes of this Act, and, immediately on a debtor being adjudged bankrupt, the property of the bankrupt shall vest in the trustee.

(2.) On the appointment of a trustee, the property shall forthwith pass to and vest in the trustee appointed."

Sect. 167: "In this Act, unless the context otherwise requires— . . . . 'Property' includes money, goods, things in action, land, and every description of property, whether real or personal, and whether situate in England or elsewhere; also obligations, easements, and every description of estate, interest, and profit, present or future, vested or contingent, arising out of or incident to property as above defined."

to September 29, 1931, less income tax, as being sufficient to satisfy the whole of the plaintiff's claim.

The county court judge, following the case of *Parkinson* v *Noel* (1), gave judgment for the plaintiff and made an order in her favour for possession of the house in seven days, for payment of the 38*l.* 7*s.* 3*d.* up to September 29, 1931, and 12*l.* 14*s.* damages since that date.

The defendant appealed.

R. F. Levy for the appellant.

C. R. D. Richmount for the respondent.

The arguments of counsel and the authorities cited appear from the judgment.

Cur. adv. vult.

May 3. The following judgment of the Court was read by

ACTON J. The short point raised by this case is whether what is usually called a "statutory tenancy" under the Rent Restriction, &c., Acts, is "property" within the meaning of s. 167 of the Bankruptcy Act, 1914, and therefore passes under s. 53 to the trustee in bankruptcy of a "statutory tenant."

There is a case tried by Greer J. by which it was decided that this was so: *Parkinson* v. *Noel* (1), but this was a decision of the question in 1922, and since then the tendency of all the later decisions seems to be in the opposite direction.

In *Nunn* v. *Pellegrini* (2), it was decided that the right of a statutory tenant is merely a personal right to retain possession of the premises, and cannot be assigned. In *Roe* v. *Russell* (3), it was decided that a statutory tenant could not assign or sub-let his tenancy of the whole of the premises, whether for value or not: per Scrutton L.J. (4) In *Lovibond & Sons, Ld.* v. *Vincent* (5), it was decided that the right of a statutory tenant is a purely personal right and cannot be transmitted by will. If the tenant dies intestate, his widow or some other member of his family residing with him is given a right to continue in possession under s. 12, sub-s. 1 (*g*), of the Act of 1920; but this is due to this express statutory provision by which the definition of "tenant" is made to include such person, and apart from that, nothing passes to the statutory tenant's administrator merely because he becomes administrator of a person who was a statutory tenant. In *Roe* v. *Russell* (1), Sargant L.J. said: "When once the conclusion is reached that the statutory tenant has no estate or property as tenant at all, but has a purely personal right to retain possession of the property, it is difficult to apply to him, as part of the terms and conditions of his former tenancy, rights essentially incidental and due to the possession of property." (2) And in *Keeves* v. *Dean* (3) Bankes L.J. said: "His right is a purely personal one, and as such, unless the statute expressly authorizes him to pass it on to another person, must cease the moment he parts with the possession or dies." (4)

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(1) [1923] 1 K. B. 117.

(2) [1924] 1 K. B. 685.

(3) [1928] 2 K. B. 117.

(4) Ibid. 130.

(5) [1929] 1 K. B. 687.

In arguing the present case, counsel was accordingly constrained to contend that it is only in the case of bankruptcy that (apart from the express statutory provisions already referred to) a statutory tenancy can pass as "property" to a person other than the statutory tenant himself.

Now in *Skinner* v. *Geary* (5), Scrutton L.J. said that "the history of the Rent Restriction Acts shows that there has been a very gradual feeling of its way by the Court with regard to the principles upon which these Acts are to be worked." (6) And later on, in the course of an authoritative review of the decided cases, he added that: "Through these cases the Court was gradually moving to the view that the statutory tenant's right was not a right of property unless such a right was expressly given by the Acts" (7), and he then went on to make reference to the statutory right given on intestacy.

(1) [1928] 2 K. B. 117.
(2) [1928] 2 K. B. 117, 131.
(3) [1924] 1 K. B. 685.
(4) [1924] 1 K. B. 685, 690.
(5) [1931] 2 K. B. 546.
(6) Ibid. 558.
(7) [1931] 2 K. B. 559.

In our opinion, it is impossible to reconcile with the principles clearly enunciated in the decisions of the Court of Appeal subsequent to *Parkinson* v. *Noel* (1) the proposition that a statutory tenancy under the Rent Restriction Acts is "property" of a tenant within the meaning of s. 167 of the Bankruptcy Act, 1914, and as such passes to the trustee in bankruptcy of the statutory tenant; and this conclusion seems to us to be inevitable, even after a careful consideration of the observations upon *Parkinson* v. *Noel* (1) made obiter by Greer L.J. in *Lovibond & Sons, Ld.* v. *Vincent.* (2)

We are therefore of opinion that this appeal should be allowed.

Appeal allowed.

Solicitor for appellant: *C. T. Nicholls.*
Solicitors for respondent: *Howard A. Laurance & Co.*

(1) [1923] 1 K. B. 117. (2) [1929] 1 K. B. 687, 696.

J. R.

FANTON *v.* DENVILLE.

C. A.

1932

March 16;
April 22.

[1931. F. 892.]

Master and Servant—Accident to Servant—Defective Plant—Negligence of Fellow-servant—Common Employment—Duty of Employer.

An employer does not warrant to his employees that the plant and property used in his business are safe; he only undertakes that he will use reasonable care to see that they are safe; and he fulfils this obligation by using reasonable care to appoint persons of competent care and skill as his delegates to provide and use the plant and property required for the business, he supplying them with the necessary financial means for this purpose. If the employer satisfies these conditions, he is not liable for injury caused to one of his servants by the negligence of such a delegate in the use of the plant.

Smith v. *Baker* [1891] A. C. 325 and *Williams* v. *Birmingham Battery and Metal Co.* [1899] 2 Q. B. 338 considered.

Judgment of Lord Cairns in *Wilson* v. *Merry* (1868) L. R. 1 H. L. (Sc.) 326 explained.

Laubach v. *Co-optimists' Entertainment Syndicate* (1926) 43 Times L. R. 30 approved.

Toronto Power Co. v. *Paskwan* [1915] A. C. 734 distinguished and, per Greer L.J., doubted: the first part of the headnote is not borne out by the judgment.

Decision of Hawke J. reversed.

APPEAL from a decision of Hawke J. in an action tried with a common jury at the Northumberland Assizes.

The plaintiff, who was an actor, was engaged by the defendant, who ran several touring companies, to appear in a play to be produced at a theatre in Gateshead. The defendant did not himself travel with the companies, his representatives at the material time being his brother, Charles Denville, who was the business manager, a stage manager, and the producer. At the Gateshead theatre the company was to produce a melodrama in which there was an execution of a murderer by hanging. The defendant had given instructions that this scene should not be represented, as many of the public did not like it. Charles Denville and the producer, however, decided to include this scene, and the plaintiff was told of this, and was offered a "double" if he did not like to undertake it. At the rehearsal, which was under the conduct of the producer, a scaffold with a drop and a mattress on which the "murderer" should fall were provided. Charles Denville, the stage manager, and the plaintiff were on the stage, and the stage manager and Charles Denville successfully went through the drop, but the plaintiff when he attempted it fell and broke his ankle. After this, extra thicknesses of baize were laid on the top of the mattress, and no further accident happened.

In respect of his accident the plaintiff sued the defendant, alleging that it was the duty of the latter to provide fit and safe machinery, plant and properties, and that it was the defendant's duty or that of his servants to take reasonable precautions to prevent danger to the plaintiff. In particular the plaintiff alleged that the defendant or his servants failed to provide a sufficient mattress to make the plaintiff's fall safe.

At the trial the jury were asked certain questions which with their answers were as follows: "(1.) Was the property as a whole reasonably fit for the purpose for which it was applied? No. (2.) If not, did the defendant know it was not safe? Yes. (3.) If not, was or were some person or persons engaged by the defendant to provide the property guilty of negligence? Yes. (4.) Was the plaintiff guilty of contributory negligence? No. (5.) If the property was dangerous, did the plaintiff know of the dangerous nature of the property? No. (6.) If the property was dangerous, did the plaintiff agree to take the risk upon himself? (Not answered.) (7.) Was the plaintiff ordered by Charles Denville or any other person authorized by the defendant to undertake the drop? Yes. (8.) Was it within Charles Denville's authority to give such order? Yes. (9.) Was the drop scene authorized by the defendant? Yes. (10.) Was the incident of trying the drop when the plaintiff sustained his injury an authorized test of the drop? Yes. (11.) Damages? 93*l*. 1*s*. 6*d*."

Upon these findings Hawke J. entered judgment for the plaintiff for 93*l*. 1*s*. 6*d*. with costs.

The defendant appealed.

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J. Alan Bell for the appellant. There was no evidence to justify the jury's finding that the defendant knew that the apparatus was not safe; he did not even know that it was being used, having in fact given instructions that the drop scene should not be represented. If there was any negligence at all, which is not admitted, it was the negligence of the plaintiff's fellow-servants, and the doctrine of common employment precludes the plaintiff recovering against the defendant: *Priestley* v. *Fowler* (1), unless it could be shown, which was not shown in this case, that the defendant knew that Charles Denville and the producer—the plaintiff's fellow-servants—were improper persons in the sense of incompetent persons to have charge of the arrangements: *Hutchinson* v. *York, Newcastle & Berwick Ry. Co.* (2); *Wigmore* v. *Jay* (3); *Searle* v. *Lindsay* (4); *Hedley* v. *Pinkney & Sons S.S. Co.* (5); *Cole* v. *De Trafford* (*No.* 2). (6)

C. B. Fenwick for the respondent. The obligation on the appellant was not only to select proper and competent persons to superintend the production of the play, but "to furnish them with adequate materials and resources for the work": per Lord Cairns L.C. in *Wilson* v. *Merry* (7); *Smith* v. *Baker* (8); and it is obvious that the materials furnished were not adequate. Further, as between master and servant, the master's obligation to provide proper material cannot be delegated: *Toronto Power Co.* v. *Paskwan.* (9)

[He also referred to *Williams* v. *Birmingham Battery and Metal Co.* (10)]

Cur. adv. vult.

April 22. The following judgments were read:—

SCRUTTON L.J. This appeal from a judgment of Hawke J., after trial at the Northumberland Assizes with a common jury, raises interesting questions both of fact and law. The

(1) (1837) 3 M. & W. 1.
(2) (1850) 5 Ex. 343.
(3) (1850) 5 Ex. 354.
(4) (1861) 11 C. B. (N. S.) 429.
(5) [1894] A. C. 222.
(6) [1918] 2 K. B. 523, 534, 535.
(7) L. R. 1 H. L. (Sc.) 326, 332.
(8) [1891] A. C. 325, 362.
(9) [1915] A. C. 734.
(10) [1899] 2 Q. B. 338.

plaintiff, Frederick Fanton, was an actor, and the defendant, Alfred Denville, had for years run for his profit several touring companies, known as stock companies, who act various plays in various towns of the provinces, usually a week at each town. He did not himself travel with the stock companies, though he occasionally visited them. The defendant had engaged the plaintiff to act any part he was required to take in the stock company, "subject to the usual rules of the profession." In the middle of December, 1930, this stock company was performing at a theatre in Gateshead. There was apparently an agreement between the defendant and the owners of the theatre by which the owners of the theatre provided stock scenery and stock properties; the visiting company provided special scenery and properties. In the week in question the visiting company was going to perform a very thrilling and popular melodrama representing the murder of Maria Martin of the Red Barn. There is a scene in the complete version of this play showing the execution of the murderer by hanging. This scene does not always suit the tastes of provincial audiences, and the actual hanging of the murderer is frequently omitted, the curtain going down before the actual hanging. There was evidence by Alfred Denville that he had given instructions not to play this scene, as people did not like it; this was confirmed by his producer, and the plaintiff said he knew that on previous occasions Alfred Denville had objected to the scene. The defendant had as his representatives with the touring company his brother, Charles Denville, as business manager, Starber the stage manager, and Rean the producer. There was some conflict of evidence how the execution scene came to be put in; it was said that the local theatre wanted it; anyhow, Charles Denville and Starber told the plaintiff, who was the "murderer," it was going to be done, and offered him a "double" if he did not like to do the drop himself. There was to be a rehearsal at 1.30 P.M., which would be under the control of Rean the producer. The local theatre had put together a scaffold with a drop, and a mattress on which to drop had been provided. I think it must be taken to have been provided by the touring company, though the evidence was obscure. Before 1.30 P.M. Charles Denville, Starber, and the plaintiff were on the stage. Rean had not arrived. The scaffold was there and the mattress. Starber went through the drop first with perfect safety; he was said to have acrobatic experience. Charles Denville did the same drop, also in safety. Then the plaintiff tried; obviously it is necessary, when the platform suddenly gives way beneath the man being hanged, that he should simultaneously bend his knees to break the force of the fall. The plaintiff did not do this apparently, and broke his ankle. When the scene was performed during the week, extra thicknesses of baize were laid on the mattress, and no accident occurred.

The statement of claim alleged negligence of the defendant or his servants, and that it was the duty of the defendant to provide fit and safe machinery and plant and properties for the carrying on of the business and of the defendant or his servants to take reasonable precautions to prevent danger to the plaintiff. It further alleged that the defendant failed to provide safe properties or plant, and the defendant, or his servants Denville or Starber, failed to use a sufficient mattress to make the plaintiff's fall safe.

The jury were asked a number of questions. They found that the mattress was not reasonably safe, and in my opinion there was evidence on which they could so find. They were asked whether the defendant knew that it was not safe, and they said he did. In my opinion there was no evidence on which they could give this answer. If it is suggested that it means that Charles Denville or Starber knew that it was unsafe the jury were not asked this, and, considering that both Charles Denville and Starber dropped in safety before the plaintiff, it would be odd if they knew it was unsafe. The jury found that some person unnamed engaged by the defendant was guilty of negligence and that the plaintiff was not guilty of contributory negligence. They were not asked if the defendant had used reasonable care to appoint competent persons to manage the production and rehearsals, and in my opinion there was no evidence on which they could have answered this question in the negative. One act of negligence is not in my opinion evidence of general incompetence, still less of the fact that the employer did not take reasonable care to secure competence. The jury found that the plaintiff did not know of the dangerous character of the mattress, and did not answer the question whether he agreed to take the risk on himself, presumably because they found he did not know of the risk. They found that Charles Denville was authorized to order the plaintiff to undertake the drop and did so. As Charles Denville was business manager and there was a producer, it is doubtful whether this answer could stand, especially as Charles Denville asked if the plaintiff objected and offered him a "double." The plaintiff admits that he was asked if he objected and said, "No." The jury then found that the execution scene was authorized by the defendant; there was in my opinion no evidence to justify this finding, unless it means that the defendant's servants authorized the drop scene; all the evidence is that the defendant always objected to the execution scene. The nearest evidence is that the producer was told by some one that the defendant had authorized the drop scene. This hearsay evidence is not sufficient to justify the answer. The jury found 93*l.* damages, and the judge entered judgment for that sum.

These facts and findings seem to me to raise the question of law whether an employer warrants that the plant and property of the business are safe, or only promises that he will use reasonable care to see that they are safe, and whether he fulfils that promise by using reasonable care to appoint competent persons to undertake that duty, and if he does so is not liable for the negligence of his delegates, the servant injured not being entitled to complain of the negligence of a fellow-servant by reason of the doctrine of common employment identified with the case of *Priestley* v. *Fowler* (1), because, in the words of Kennedy L.J. in *Young* v. *Hoffmann Manufacturing Co.* (2), "the master does not undertake to

(1) 3 M. & W. 1.

(2) [1907] 2 K. B. 646, 657.

indemnify the servant against the consequences of the negligence of any person except the master himself."

The doctrine of common employment, which is usually connected with the case of *Priestley* v. *Fowler* (1) and the judgment of Lord Abinger, obtains its first detailed discussion in the independent decision in *Hutchinson* v. *York, Newcastle & Berwick Ry. Co.* (2) in 1850, and the judgment therein of the Court, including Parke B., delivered by Alderson B., and the judgment of Shaw C.J. in the Massachusetts case of *Farwell* v. *Boston & Worcester Railroad Corporation.* (3) After struggles by the Scottish judges to assert that the doctrine was no part of the law of Scotland, it was established by the House of Lords as part of the law of the United Kingdom in *Bartonshill Coal Co.* v. *Reid* (4) and *Bartonshill Coal Co.* v. *McGuire* (5) in 1858; *Wilson* v. *Merry* (6) in 1868; *Johnson* v. *Lindsay & Co.* (7), per Lord Herschell; and *Hedley* v. *Pinkney & Sons S.S. Co.* (8) in 1894. The doctrine has been established so long and by such high authorities that it is impossible, in my opinion, in 1932 even for the House of Lords in its judicial capacity to overrule it. That questions arise as to its exact limits may follow from considerable vagueness in its original statement. In *Priestley* v. *Fowler* (1) a servant sued his master for damages caused by the breakdown of the master's van in which the servant was travelling in the course of his employment. The declaration alleged that the master did not use proper care that the van should be in a sufficient state of repair, or that it should not be overloaded, or that the plaintiff should be safely and securely carried thereby. At the trial the plaintiff gave evidence that the master knew that the van was overloaded, and a verdict was given for him. Nevertheless the judgment was set aside. The reasoning of Lord Abinger is not very satisfactory. He brackets the negligence of servants, strictly so called, with the negligence of the coachmaker or the harness-maker or the upholsterer, who would appear to be

(1) 3 M. & W. 1.
(2) 5 Ex. 343.
(3) (1842) 3 Macq. 316.
(4) (1858) 3 Macq. 266.
(5) (1858) 3 Macq. 300.
(6) L. R. 1 H. L. (Sc.) 326.
(7) [1891] A. C. 371.
(8) [1894] A. C. 222.

independent contractors, and he makes no reference to the master's knowledge of the defect. So far as any principle is stated in the decision, it is that as the servant knows as much about the risk as the master, he cannot hold the master liable for the risks which he, the servant, undertakes. The judgment, to which Parke B. was a party, does say that the master "is, no doubt, bound to provide for the safety of his servant in the course of his employment, to the best of his judgment, information, and belief," and it does speak of "any injury the servant may sustain by the negligence of others engaged under the same master"; but the fact remains that the declaration did not allege any negligence by fellow-servants but did allege that the master did not use proper care that the van should not be overloaded. The plaintiff supported the declaration by evidence that the master knew that the van was overloaded, and the jury found for the plaintiff. Yet the Court of Exchequer set aside the verdict on the ground that the duty alleged in the declaration did not exist; that is, that the master was not liable to the servant for damage caused by the overloading, to the master's knowledge, of a van in which the servant had to travel in the course of his employment. That the matter is at present in some confusion is shown by the decision of McCardie J. in *Baker* v. *James & Sons, Ld.* (1), where, while treating *Priestley* v. *Fowler* (2) as good law, he yet decides that damage caused to the plaintiff by a motor-car, defective to the knowledge of the master, can be recovered by the servant, a decision exactly the opposite of that in *Priestley* v. *Fowler.* (2) McCardie J. says that *Priestley* v. *Fowler* (2) "did not purport to deal with the personal negligence of the master. It dealt with the negligence of a fellow-servant." I cannot find this in the report of the declaration, which alleges a duty of the master, or in the evidence which alleged the master's knowledge of overloading. Lord Loreburn treated *Priestley* v. *Fowler* (2) as good law in *Coldrick* v. *Partridge, Jones & Co.* (3)

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(1) [1921] 2 K. B. 674.
(2) 3 M. & W. 1.
(3) [1910] A. C. 77.

To ascertain what is the exact and original doctrine of common employment connected with the name of *Priestley* v. *Fowler* (1) one must look at the judgment of Shaw C.J. in *Farwell's* case (2), and of the Court of Exchequer, delivered by Alderson B., in *Hutchinson's* case (3), both of them cases where in a properly constructed system of railways one railway servant was injured by the negligence of another railway servant but sued the railway company.

In *Farwell's* case (2) Shaw C.J. put the principle thus: "The general rule, resulting from considerations as well of justice as of policy, is, that he who engages in the employment of another for the performance of specified duties and services for compensation takes upon himself the natural risks and perils incident to the performance of such services, and in legal presumption the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is as likely to know, and against which he can as effectually guard, as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any others." Later in his judgment he said (4): "Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service, if the common employer will not take such precautions and employ such agents as the safety of the whole party may require. By these means the safety of each will be much more effectually secured than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other. Regarding it in this light, it is the ordinary case of one sustaining an injury in the course of his own employment, in which he must bear the loss himself, or seek

(1) 3 M. & W. 1.
(2) 3 Macq. 316, 317.
(3) 5 Ex. 343.
(4) 3 Macq. 319.

his remedy, if he have any, against the actual wrongdoer." The Chief Justice treated the case as one where "no wilful wrong or actual negligence was imputed to the corporation, and where suitable means were furnished and suitable persons employed to accomplish the object in view," and he declined to decide whether the employer would be responsible to a servant for loss arising from a defective or ill-constructed steam engine, and, if so, whether it would be on the ground of misconduct or negligence of the employer or of the manager in the case of a company.

Alderson B., in *Hutchinson's* case (1), puts the matter thus (2): "In such a case, however, we are of opinion that the master is not in general responsible, when he has selected persons of competent care and skill. Put the case of a master employing A. and B., two of his servants, to drive his cattle to market. It is admitted, that if by the unskilfulness of A. a stranger is injured, the master is responsible. Not so, if A. by his unskilfulness hurts himself; he cannot treat that as the want of skill of his master. Suppose, then, that by the unskilfulness of A., B. the other servant is injured while they are jointly engaged in the same service, there we think B. has no claim against the master. They have both engaged in a common service, the duties of which impose a certain risk on each of them; and in case of negligence on the part of the other, the party injured knows that the negligence is that of his fellow-servant and not of his master. He knew, when he engaged in the service, that he was exposed to the risk of injury, not only from his own want of skill or care, but also from the want of it on the part of his fellow-servant; and he must be supposed to have contracted on the terms that, as between himself and his master, he would run this risk." It will be noted that the Court, which included Parke and Martin BB., put an obligation on the master to select fellow-servants of competent care and skill, Alderson B. saying (3): "Though we have said that a master is not in general responsible to one servant for an injury occasioned to him by the negligence of a fellow-servant while they are acting in one common service, yet this must be taken with the qualification that the master shall have taken due care not to expose his servant to unreasonable risks. The servant, when he engages to run the risks of his service, including those arising from the negligence of fellow-servants, has a right to understand that the master has taken reasonable care to protect him from such risks by associating him only with persons of ordinary skill and care."

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(1) 5 Ex. 343. (2) 5 Ex. 351. (3) 5 Ex. 353.

Sir Frederick Pollock, in his work on Torts, 13th ed., p. 104, quotes the statement of Erle C.J. in *Tunney* v. *Midland Ry. Co.* (1) as "a clear judicial statement of [the rule] in its settled form : 'A servant, when he engages to serve a master, undertakes, as between himself and his master, to run all the ordinary risks of the service, including the risk of negligence upon the part of a fellow-servant when he is acting in the discharge of his duty as servant of him who is the common master of both' "; and Lord Herschell, in *Johnson* v. *Lindsay & Co.* (2), quotes Lord Cranworth in *Bartonshill Coal Co.* v. *Reid* (3) thus : "When several workmen engage to serve a master in a common work, they know, or ought to know, the risks to which they are exposing themselves, including the risks of carelessness, against which their employer cannot secure them, and they must be supposed to contract with reference to such risks."

It will be seen that so far the "doctrine of common employment" protects the master from liability to one servant for loss caused by the negligence of a fellow-servant, but leaves vague what duties, if any, lie on the master himself as to the provision of suitable plant and competent fellow-servants. Is the master's duty to make good an absolute warranty of the fitness of buildings and plant employed in his business for their purpose, or is it an obligation merely personally to use reasonable care to see that they are fit, and does the master fulfil this duty by using reasonable care to appoint competent servants, in which case he is not liable if they act negligently ?

(1) (1866) L. R. 1 C. P. 291, 296.
(2) [1891] A. C. 371, 376.
(3) 3 Macq. 266, 295.

The point was first considered in the same year in which *Hutchinson's* case (1) was decided and by the same Court. In *Wigmore* v. *Jay* (2) the employer was erecting a building, and employed persons as to whom there was no evidence that they were incompetent to erect a scaffolding for that purpose. Those persons used an unsound scaffold pole after its unsoundness had been pointed out to the foreman. The pole broke in use and the plaintiff, a bricklayer, on it was injured and sued the master. It was held that the plaintiff could not recover, as there was no evidence that the master had employed an incompetent person to erect the scaffolding. This case is quite inconsistent with any absolute undertaking to provide suitable plant.

In 1861, in *Riley* v. *Baxendale* (3), where a turntable was so constructed as to be dangerous if a particular size of truck was used, the declaration alleged a duty on the employer to take due and ordinary care not to expose the servant to extraordinary danger in the employment. The Court refused to recognize such a duty, and Martin B. said he had frequently so ruled and his decision had never been questioned. Pollock C.B. said (4): "This is an attempt to nullify the decision of the Court in *Priestley* v. *Fowler* (5), and to enlarge the case in which persons in the relation of master or employer are to be made responsible for injuries incurred by those in their employment, who are in general much more able to judge of the probability and extent of the risk they run in the service, than those who employ them."

In *Seymour* v. *Maddox* (6), in 1851, the declaration alleged a duty by an employer to a servant to provide well lighted and fenced premises in which the servant was to be employed, and knowledge by the employer that the premises were not well lighted and fenced, but the Court of Queen's Bench held that there was no such duty as alleged.

In *Potts* v. *Port Carlisle Dock and Ry. Co.* (7), in 1860, the fact that a turntable was defective in construction whereby a servant

(1) 5 Ex. 343.
(2) 5 Ex. 354.
(3) (1861) 30 L. J. (Ex.) 87.
(4) 30 L. J. (Ex.) 88.
(5) 3 M. & W. 1.
(6) (1851) 16 Q. B. 326.
(7) (1860) 8 W. R. 524.

was killed was held ineffective to make the employers liable in the absence of evidence that the employers had engaged incompetent persons to construct it. Crompton J. speaks of " that species of negligence for which alone they could be rendered liable in the action, namely, that they had negligently employed incompetent persons to make the turntable."

In *Brown* v. *Accrington Cotton Spinning, &c., Co.* (1) the headnote is : " A person who erects a building by contract, and employs a clerk of the works to superintend the erection, is not liable for injury occasioned to a workman in the building by reason of its negligent construction, unless he personally interfered or negligently appointed an incompetent clerk of the works with knowledge of his incompetency."

In *Feltham* v. *England* (2) in 1866, where new piers of brickwork collapsed the first time they were used, killing a servant, it was held that the master was not liable, as there was no evidence of personal negligence on his part in employing an incompetent foreman, or in employing incompetent persons to build the piers, or that he knew or ought to have known that the piers were insufficient.

In *Cribb* v. *Kynoch, Ld.* (3), a Divisional Court, in an exhaustive judgment examining the cases, delivered by Bray J., held that though there was a duty on an employer to give instructions to a young and inexperienced person engaged in a dangerous work, he fulfilled that duty by delegating its performance to a competent foreman, and was not liable if that foreman was negligent in the matter. The whole judgment repays careful perusal, especially as in the same year in *Young* v. *Hoffmann Manufacturing Co.* (4) the Court of Appeal approved and adopted it. In that case Kennedy L.J. puts the obligation of the master (*a*) to use reasonable care to select competent fellow-servants, but not to indemnify the servant against the negligence of such fellow-servants, and (*b*) to use reasonable care in having and keeping his machinery in proper condition and free from defect. The Lord Justice does not expressly say that the master can perform the latter obligation by appointing competent persons to perform it, but he does say that the master can perform his duty as to warning and instructing as to the use of dangerous machinery by such an appointment. This and the judgment in *Wilson* v. *Merry* (1) next to be referred to appear to cover the proposition that the master's duty may be fulfilled by appointing competent persons to perform it unless he himself knows of the defect. This statement is, I think, supported by the judgment of this Court in *Cole* v. *De Trafford* (*No.* 2). (2) It is also clearly supported by the well known passage in Lord Cairns' judgment in *Wilson* v. *Merry.* (1) In that case in a coal mine with a proper system of ventilation a scaffold was erected which was so improper that it stopped the ventilation of the mine, whereby an explosion of fire-damp occurred and a man was killed. His widow sued the employers. It was not suggested that the employers themselves took any part in the erection of the platform, nor was any personal fault or negligence of any kind imputed to them. The House of Lords held the employers not liable. Lord Cairns said (3): "The master is not, and cannot be, liable to his servant unless there be negligence on the part of the master in that in which he, the master, has contracted or undertaken with his servant to do. The master has not contracted or undertaken to execute in person the work connected with his business. The result of an obligation on the master personally to execute the work connected with his business, in place of being beneficial, might be disastrous to his servants, for the master might be incompetent personally to perform the work. At all events, a servant may choose for himself between serving a master who does, and a master who does not, attend in person to his business. But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to

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(1) (1865) 3 H. & C. 511.
(2) (1866) L. R. 2 Q. B. 33.
(3) [1907] 2 K. B. 548.
(4) [1907] 2 K. B. 646.

(1) L. R. 1 H. L. (Sc.) 326.
(2) [1918] 2 K. B. 523.
(3) L. R. 1 H. L. (Sc.) 332.

furnish them with adequate materials and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do. And if the persons so selected are guilty of negligence this is not the negligence of the master; and if an accident occurs to a workman to-day in consequence of the negligence of another workman, skilful and competent, who was formerly, but is no longer in the employment of the master, the master is, in my opinion, not liable, although the two workmen cannot technically be described as fellow-workmen. As was said in the case of *Tarrant* v. *Webb* (1), negligence cannot exist if the master does his best to employ competent persons; he cannot warrant the competency of his servants." Again, Lord Cairns said (2): "I think the learned judge ought to have told the jury that if they were of opinion that the respondents exercised due care in selecting proper and competent persons for the work and furnished them with suitable means and resources to accomplish the work, the respondents were not liable to the appellant for the consequences of the accident." It will be noticed that in each passage Lord Cairns uses the phrase "and to furnish them with adequate"—or "suitable"—"materials (or means) and resources for the work." But in my opinion this does not mean that while the master need only use reasonable care to appoint competent servants, he must himself judge of the suitability of the materials used. Lord Cairns has in the previous passage protested against a personal obligation of a master to perform work which he might be incompetent personally to perform; he cannot mean that though this is so the master undertakes himself to select proper materials. I take the passage to mean that he may delegate the work and provision of materials to competent servants, provided he supplies them with the financial means and resources to get the materials for the work and perform the work. To hold otherwise would be to overrule the series of cases beginning with *Wigmore* v. *Jay* (3) to which I have referred. Counsel for the plaintiff strongly

(1) (1856) 25 L. J. (C. P.) 261.
(2) L. R. 1 H. L. (Sc.) 333.
(3) 5 Ex. 354.

relied on the passage in the judgment of Lord Herschell in *Smith* v. *Baker* (1), where he said: "It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk. Whatever the dangers of the employment which the employed undertakes, amongst them is certainly not to be numbered the risk of the employer's negligence, and the creation or enhancement of danger thereby engendered." But it is necessary to appreciate the nature of the action in *Smith* v. *Baker*. (1) It was not an action at common law; it was an action under the Employers' Liability Act, 1880, based on defects in the condition of the plant which the Court held to include a defective system of working. Two points were decided by the House, first, that as the defence that there was no evidence of negligence of the employer was not taken before the county court judge it could not be taken on appeal. This at once shut out from consideration of the House any question of what constituted negligence of an employer, and whether, if he appointed competent persons to carry on the work, he was liable for their negligence in the method of carrying out the work by allowing the workman to work with a crane swinging over his head. Therefore very few of the decisions cited in this judgment as to what may constitute negligence of the employer to prevent the application of the doctrine of common employment were referred to. Two Scottish cases were cited to show that the employer might be liable for a defective system which he was taken to know of, but they were cited in connection with the Employers' Liability Act. The second point was whether under the Employers' Liability Act working with knowledge of the risk was a defence against the workman's case, and the House, as I understand, decided by a majority that the maxim was "volenti non fit injuria" not "scienti non fit injuria," and that to make a defence it must be shown as a fact that the workman was willing and agreed to take the risk,

(1) [1891] A. C. 325, 362.

not merely that he knew of it. But in the common law doctrine the implication of taking risk is based not on an agreement in fact but on a rule of law arising from the relation of employer and employed. As Collins M.R. said in *Burr* v. *Theatre Royal, Drury Lane* (1): " We are here dealing with a positive rule of law with regard to the relation of employer and employed, which is really based upon considerations incidental to that relation rather than on any actual intention inferred to have existed in the minds of the parties in the particular case. It is a fundamental principle of law, except where the Legislature has provided to the contrary, that, wherever the relation of employer and employed exists, there is this limitation of the liability of the employer as regards injury occasioned by the negligence of a fellow-servant." See also Salmond on Torts, 7th ed., p. 126, where it is said that " the reason alleged for this exemption of the employer from liability to his own servants is that a servant impliedly agrees to run the risk naturally incident to the employment undertaken by him, and that one of these risks is that of harm due to the negligence or incompetence of his fellow-servants. 'When several workmen,' says Lord Cranworth (2), 'engage to serve a master in a common work, they know, or ought to know, the risks to which they are exposing themselves, including the risks of carelessness, against which their employer cannot secure them, and they must be supposed to contract with reference to such risks.' The rule, that is to say, is an application of the maxim Volenti non fit injuria. This presumption that a servant agrees to take upon himself the risk of his fellow-servants' negligence is, however, not a mere presumption of fact, as in other cases in which the maxim is applied; it is a presumption of law, which can be excluded by nothing less than an express agreement between master and man by which the master forgoes the benefit of it." Lord Herschell and the House of Lords in *Smith* v. *Baker* (3) were not considering the limitations of the doctrine of common employment, and their attention was not called

(1) [1907] 1 K. B. 544, 555.
(2) 3 Macq. 266, 295.
(3) [1891] A. C. 325.

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to the authorities as to what would constitute a breach of duty by a master if he had appointed with reasonable care competent servants.

The other case relied on by the plaintiff was *Williams* v. *Birmingham Battery and Metal Co.* (1), where in the defendants' factory no ladder was provided for descending from a tramway but the workman habitually climbed up and down a wall by spikes and bars. The point of the workman's having taken the risk was not raised at the trial, and the numerous cases cited in this judgment were not referred to. The case was dealt with on the lines of *Smith* v. *Baker* (2), and I think the employer was treated as having with personal knowledge provided a dangerous system. In view of the subsequent decision of the Court of Appeal in *Young's* case (3) I am not able to treat the decision in *Williams* v. *Birmingham Battery and Metal Co.* (1) as binding me to hold that where the employer has taken reasonable care to appoint competent people to provide plant he is liable if they, without his knowledge, negligently provide dangerous plant. I think the law is accurately stated in Salmond on Torts, 7th ed., p. 130; "A master, although he is not responsible to his servant for the negligence of a fellow-servant, is yet responsible for his own negligence; and for this purpose it is negligence to omit to use reasonable care in choosing competent and careful servants and in dismissing those who prove themselves incompetent and careless. Similarly, the providing of a proper plant, as distinguished from its subsequent care, is especially within the province of the master rather than of his servants. The master cannot relieve himself of responsibility merely by delegating it to a person who is incompetent for the task. But there is no rule of law that an employer, not guilty of any negligence himself, is nevertheless to be held liable because he was bound to supply plant."

Where the master has used reasonable care to delegate, and is not aware of the negligence of the delegate, in my opinion he is not liable for the consequences of that negligence to the fellow-servant. The case of *Laubach* v. *Co-optimists' Entertainment Syndicate* (1), where a delegate supplied defective plant for use whereby injury was caused to a fellow servant, and Finlay J. held the master not liable was, in my opinion, correctly decided. In the Privy Council case of *Toronto Power Co.* v. *Paskwan* (2), the headnote, in my opinion, when compared with the language of Sir Arthur Channell (3), cannot be justified; the earlier cases such as *Wigmore* v. *Jay* (4) were not cited to the Court, and the decision, in my opinion, must be limited to cases where the employer personally and negligently sanctions an improper system.

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(1) [1899] 2 Q. B. 338.

(2) [1891] A. C. 325.

(3) [1907] 2 K. B. 646.

The present case is to be decided on the footing that the defendant did not know that the execution scene was to be performed, that he had delegated to competent persons the production of plays, that one of them had negligently provided improper plant for a particular scene, but that the defendant did not know of this. On these findings, in my opinion, the doctrine of common employment, as defined in the cases to which I have referred, prevents the employee from recovering against his employer.

The appeal must therefore be allowed, the judgment for the plaintiff set aside, and judgment entered for the defendant with costs here and below.

GREER L.J. This case raises an important question of principle; that is to say, whether an employer is responsible for the negligence of his foreman or manager in failing to supply safe machinery or plant for the use of his servants, or in failing to see that the machinery or plant, when used, is reasonably safe for use by his employees.

I need not repeat the facts of the case, which are set out in the judgment of Scrutton L.J. I have come to the same conclusion as the Lord Justice, that even in cases where the negligence relied on by the plaintiff consists of negligence in the supply or maintenance of plant or machinery, the employer is only liable if personal negligence is proved, and that if the failure to supply or maintain the plant or machinery in a safe condition is due to the negligence of a manager to whom the duty has been entrusted by the employer, the employer is not responsible unless it can be shown that he failed to use reasonable care to select a competent manager, or that he has in some way been guilty of personal negligence in connection with the instalment or maintenance of the machinery or plant or in permitting the continuance of its use after he became aware of its unsafe condition.

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(1) 43 Times L. R. 30.
(2) [1915] A. C. 734.
(3) [1915] A. C. 738.
(4) 5 Ex. 354.

The following cases seem to me to prove the above proposition, unless they ought to be disregarded as inconsistent with the decision of the House of Lords in *Smith* v. *Baker* (1) and the decision of the Privy Council in *Toronto Power Co.* v. *Paskwan.* (2) The cases I refer to are *Wigmore* v. *Jay* (3); *Hedley* v. *Pinkney & Sons S.S. Co.* (4); *Coldrick* v. *Partridge, Jones & Co.* (5); *Searle* v. *Lindsay* (6); *Potts* v. *Port Carlisle Dock and Ry. Co.* (7); *Brown* v. *Accrington Cotton Spinning and Manufacturing Co.* (8); *Cole* v. *De Trafford* (*No.* 2) (9), a decision of the Court of Appeal; *Seymour* v. *Maddox* (10); and *Laubach* v. *Co-optimists' Entertainment Syndicate.* (11) The last named case, a decision of Finlay J., seems to me to be on all fours with the present case, and, if rightly decided, it would determine the present case in the defendant's favour,

I have not been able to find, nor have we been referred to, any reported cases decided by English Courts in which it has been expressly held that the doctrine of common employment has no application to claims based on the negligence of a foreman, manager, or other fellow-employee in the provision or maintenance of plant or machinery.

I do not think it necessary to do more than refer to the cases cited above by their titles. It seems to me to be beyond question that they do, if rightly decided, establish that the employer is free from liability except for his own

(1) [1891] A. C. 325.
(2) [1915] A. C. 734.
(3) 5 Ex. 354.
(4) [1894] A. C. 222.
(5) [1910] A. C. 77.
(6) 11 C. B. (N. S.) 429.
(7) 8 W. R. 524.
(8) 3 H. & C. 511.
(9) [1918] 2 K. B. 523.
(10) 16 Q. B. 326.
(11) 43 Times L. R. 30.

personal negligence. It has, of course, to be remembered that in actions against companies a general manager of the business is deemed to be the alter ego of the company, and it would be responsible for his personal negligence. In the present case, however, we have not to deal with a claim against a limited company, but with a claim against an individual employer.

It remains for me to consider whether there is anything in the speeches of the learned lords in *Smith* v. *Baker* (1) and the decision of the Privy Council in *Toronto Power Co.* v. *Paskwan* (2) that should compel this Court to hold that the rule of law applied in this long series of cases is wrong and should not be treated as decisive of the present appeal.

The decision of the House of Lords in *Smith* v. *Baker* (1) was given in a case in which the plaintiff's claim was made under the provisions of the Employers' Liability Act, 1880. That Act was passed in order to extend the liability of employers to make compensation for personal injuries suffered by their workmen. It does not seem probable that the Act, so far as it gave a remedy for defects in the condition of the ways, works, machinery, or plant, gave to the workman a remedy limited in amount to his estimated earnings during the three years preceding the injury in respect of a cause of action for which he had a common law right to be compensated without any limit as to the damages he could recover. Sect. 1 of the Act provides that where after the commencement of the Act personal injury is caused to a workman by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer, a remedy is given to him and his personal representatives, if he has been killed, provided (as stated by s. 2) that he shows that the defect therein mentioned arose from, or had not been discovered or remedied owing to, the negligence of the employer or of some person in the service of the employer and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition. It is obvious that if the employer were responsible at common law for the negligence of the person entrusted by him with the duty mentioned, the Act would have had the effect of giving a limited right to damages to a workman who already had the right without any limit. It seems to me to be implied in the statute that in making the employer responsible in any event, however careful he may have been himself, for the negligence of the person in his service entrusted with the duty of seeing that the ways, works, machinery, or plant were in proper condition, the Legislature was giving to the workman remedies which he had not apart from the statute, and imposing upon the employer a liability which was not imposed upon him by the common law. This, of course, is not conclusive, because the Legislature may have been either mistaken or doubtful as to what was the state of the existing law. The only questions in *Smith* v. *Baker* (1) on which the House of Lords gave a decision were two: (1.) whether the fact that the plaintiff had worked with a knowledge of the defects complained of afforded evidence conclusive in law that he voluntarily incurred the risk, and was thereby precluded from succeeding in the action; and (2.) whether the appellant employers, not having taken the point that there was no evidence that the defects complained of were due to any negligence by the employers or the persons entrusted by them with the duty of seeing to the safety of the ways, works, machinery, or plant, could rely in the appeal from the county court on the absence of negligence. The question whether, on the facts proved in the case and the findings of the jury, the employer would have been liable at common law was not at any time an issue in the case, but several of their Lordships made observations which have sometimes been regarded as authority for the proposition that at common law the employer was responsible for the negligence of the person to whom he entrusted the duty of installing and maintaining the plant. Lord Halsbury says (2): "I think the cases cited at your Lordships' Bar of *Sword* v. *Cameron* (3)

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(1) [1891] A. C. 325.

(2) [1915] A. C. 734.

(1) [1891] A. C. 325.
(2) [1891] A. C. 339.
(3) (1839) 1 D. 493.

and the *Bartonshill Coal Co.* v. *McGuire* (1) established conclusively the point for which they were cited, that a negligent system or a negligent mode of using perfectly sound machinery may make the employer liable quite apart from any of the provisions of the Employers' Liability Act. In *Sword* v. *Cameron* (2) it could hardly be doubted that the quarryman who was injured by the explosion of the blast in the quarry was perfectly aware of the risk; but nevertheless he was held entitled to recover notwithstanding that knowledge." Lord Watson, referring to s. 2, sub-s. 3, of the Employers' Liability Act, says (3): "I think the object and effect of the enactment is to relieve the employer of liability for injuries occasioned by defects which were neither known to him nor to his delegates down to the time when the injury was done. At common law his ignorance would not have barred the workman's claim, as he [that is the employer] was bound to see that his machinery and works were free from defect, and so far the provision operates in favour of the employer." On the other hand, Lord Herschell's speech is consistent with the law, as it appears from the many cases referred to above that the employer is only liable for his personal negligence. He, like Lord Halsbury and Lord Watson, expresses approval of the Scottish case of *Sword* v. *Cameron* (2), but points out that in the case of *Bartonshill Coal Co.* v. *Reid* (4) Lord Cranworth, in approving *Sword* v. *Cameron* (2), pointed out that it was to be inferred from the facts stated that the notices and signals given were those that had been sanctioned by the employer, and he impliedly states the employer's duty at common law to be to take reasonable care so to carry on his business as not to subject those employed by him to undue risk. It seems to me that the employer can perform this duty by taking reasonable care to employ competent men to see that safe machinery, plant and appliances are provided and maintained for the use of his workpeople. Of course, if the employer, instead of appointing competent people to undertake this duty, undertakes it himself, and does it negligently, he would be liable at common law. I do not think that Lord Halsbury meant to say that the cases of *Sword* v. *Cameron* (1) and *Bartonshill Coal Co.* v. *McGuire* (2) established the principle that the employer was liable in every case where it is proved that there was a negligent system or a negligent mode of using perfectly sound machinery. I think the meaning of the words which I have quoted is that the employer would be liable if he was personally guilty of negligence in knowingly allowing a negligent system of work to be carried out, or in failing to appoint competent people to devise for him a system of work to be carried out in his absence. With regard to the statement I have quoted from Lord Watson's speech, I think, if literally interpreted, it does not accurately represent the law on the subject. Too much importance ought not to be attached to the observations of members of a tribunal on questions that were not involved in the case they had to consider when they did not have before them any citation of the relevant authorities.

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(1) 3 Macq. 300.
(2) 1 D. 493.
(3) [1891] A. C. 356.
(4) 3 Macq. 266, 290.

The decision of the Privy Council in *Toronto Power Co.* v. *Paskwan* (3) seems to me inconsistent with the whole trend of the English decisions, and, being a decision on the law of Canada, is not an authority which we are bound to follow.

In the present case there was no evidence that the defendant had failed to exercise reasonable care in selecting competent persons to acquire and maintain suitable and safe apparatus for the rehearsal and performance by his travelling company of plays in their repertoire. There was no evidence that the accident to the plaintiff was due to the personal negligence of the defendant, but, on the contrary, that if there was any negligence proved to be the cause of the plaintiff's injuries, such negligence was the negligence of a fellow-servant, in consequence of which, by reason of the long accepted doctrine of common employment, the plaintiff is disentitled to recover.

I agree, therefore, with my Lord that the appeal should be allowed with costs.

(1) 1 D. 493. (2) 3 Macq. 300. (3) [1915] A. C. 734.

SLESSER L.J. In this case, sought to be founded upon the alleged negligence of the defendant, his servants or agents, the jury have answered a number of questions put to them by the learned judge at the trial with a resulting finding of damages against the defendant. In one case an answer was given to an essential question on which to found liability (namely, whether the defendant knew that his property was not safe), which answer, in my opinion, cannot be supported by the evidence adduced.

The jury were asked first: "Was the property as a whole reasonably fit for the purpose for which it was applied?" They replied "No." This answer was one which they were competent to give. The ninth question was this: "Was the drop scene authorized by the defendant?" The answer "Yes" may doubtfully be defended on the ground that a Mr. Rean, the defendant's producer, stated (in examination in chief) that he had been told that the defendant had authorized the use of the dangerous property, the trap. If such a statement was evidence at all apparently no objection was taken to it. The second question, however, as I have said, was in the following terms: "If not, did the defendant know it [the property] was not safe?" To which the jury answered "Yes." Assuming that the other answers could properly have been returned by the jury, the answer to question 2, that the master knew that the property was unsafe, would conclude this appeal in favour of the plaintiff. For his own personal negligence the master is always liable to his workmen: *Thomas* v. *Quartermaine* (1), per Bowen L.J.; see also per Lord Herschell in *Smith* v. *Baker*. (2) If the property was not reasonably fit for its purpose and the master had authorized its use (question 9) and knew it was not safe (question 2) he would have permitted its use after he knew of its unsafe condition, and so might have been found negligent.

The want of evidence to support the finding in question 2 admits of no doubt. The plaintiff said that he knew that the defendant on previous occasions had objected to the scene being introduced. The defendant said that his instructions

(1) (1887) 18 Q. B. D. 685, 691. (2) [1891] A. C. 325, 362.

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were not to have the scene. Mr. Rean, the producer, said that the defendant objected to the hanging scene and would never allow it. The most that can be put against the defendant on this point is that Mr. Rean also said in evidence that a Mr. Starber had told him that the defendant had authorized the use of the trap. Assuming this evidence to be accepted, it does not provide any basis for the finding of the jury that the defendant knew that the trap was not safe or allowed the continuance of its unsafe use. I assume therefore, as I must, that this question was answered in the negative, as it ought to have been, and proceed to consider what is the legal liability of the defendant, if any, assuming in his favour that he did not know that the trap was not safe. In such circumstances, the injury to the plaintiff must be taken to have been caused by the negligence of some person engaged by the defendant to provide the trap or maintain it in safety. This indeed was the view of the jury, because, notwithstanding that they had been asked in the second question whether the defendant knew that the trap was not safe, in answer to the third question—namely, "If not, was or were some person or persons engaged by the defendant to provide the property, guilty of negligence?" they answer "Yes." And I think there was evidence on which they could so answer.

The question therefore arises, assuming that the persons engaged by the defendant to provide the trap were negligent, how far, if at all, was the defendant liable as employer for their negligence. The persons who provided the trap—namely, Mr. Rean, the producer, and Mr. Charles Denville, the business manager, were both in common employment with the plaintiff. Though there are cases in which it is difficult to decide whether servants of the same master are fellow-workmen within the meaning of the rule laid down in *Priestley* v. *Fowler* (1), the present case presents no such difficulty. Nor indeed was it seriously argued that the producer, the business manager, and the plaintiff were not in the common employment of the defendant in the production of the play. They were engaged in a common undertaking in the service of a common master: *Johnson* v. *Lindsay & Co.* (1) The principle to be applied is laid down by Lord Cranworth in *Bartonshill Coal Co.* v. *Reid* (2) as follows: "When several workmen engage to serve a master in a common work, they know, or ought to know, the risks to which they are exposing themselves, including the risks of carelessness, against which their employer cannot secure them, and they must be supposed to contract with reference to such risks." A servant "has not stipulated for a right of action against his master if he sustains damage from the negligence of a fellow-servant": per Bramwell L.J. in *Swainson* v. *North-Eastern Ry. Co.* (3) For this purpose one servant may be the superior of the other: *Hedley* v. *Pinkney & Sons S.S. Co.* (4) I forbear from quoting the many other cases which have supported this proposition. In my view, in order that the plaintiff may succeed, in the absence of direct evidence that the master has himself been negligent, he must show that the master has not done his best to employ competent persons; "he is not bound to warrant their competency": per Jervis C.J. in *Tarrant* v. *Webb.* (5)

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(1) 3 M. & W. 1.

This case may be put for the plaintiff either (*a*) on a failure on the part of the management to caution or instruct the plaintiff, or (*b*) on the ground of failure to provide proper plant and machinery. (*a*) Generally the defence of common employment is open to an employer, where he has delegated the duty of instructing and cautioning a workman employed on dangerous work, if the master has delegated that duty to a competent person who proves in the event to have been negligent in not properly instructing or cautioning the injured workman. So I read the decision of this Court in *Young* v. *Hoffmann Manufacturing Co.* (6); see also *Cribb* v. *Kynoch, Ld.* (7), a decision of a Divisional Court to the like effect expressly approved by the Court of Appeal in *Young's* case. (6) In the latter case Cozens-Hardy M.R. said (8): "If it is

(1) [1891] A. C. 371.
(2) 3 Macq. 266, 295.
(3) (1878) 3 Ex. D. 341, 348.
(4) [1894] A. C. 222.
(5) (1856) 18 C. B. 797, 804.
(6) [1907] 2 K. B. 646.
(7) [1907] 2 K. B. 548.
(8) [1907] 2 K. B. 651.

established that a competent foreman was employed by the defendants whose duty it was, either by reason of express directions or by reason of directions implied from the nature of his employment, to give proper instruction, regard being had to the plaintiff's age and other circumstances, the defendants will not be liable for the omission of the foreman to give proper instruction."

In this appeal there is no finding that the manager or producer was not competent and, therefore, even if they were negligent in instructing the plaintiff to jump through the trap or failing to tell him how to jump, the case would fall directly within the decision in *Young* v. *Hoffmann Manufacturing Co.* (1), and the defendant employer would not be liable. But (*b*) the case may be put against the defendant in another way, outside the doctrine of common employment altogether, that is on the ground of failure to provide proper plant. It has been said that " when a master employs his servant in a work of danger he is bound to exercise due care in order to have his tackle and machinery in a safe and proper condition": per Lord Cranworth in *Bartonshill Coal Co.* v. *Reid* (2), and that it may be argued that apart from injury suffered from the negligence of the producer or manager, there was a direct obligation on the master to have the trap and mattress beneath it in a safe and proper condition, which obligation he has failed to satisfy. A master is under a duty of seeing that the condition of the works where he employs his servants is reasonably suitable and safe for the purpose for which the works are used: *Patterson* v. *Wallace.* (3) The case of *Wilson* v. *Merry* (4) is the leading authority in this class of case. There, no personal negligence was imputed to the employer. The charge of making arrangements for working a coal mine was given by the employer to officials who were found to have been selected with care. Lord Cairns said (5): " What the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work." But the materials in that case are stated by Lord Cairns to have been furnished for working in the best manner. So that it does not fully decide the problem. What is the position if the failure to furnish proper materials is due to the negligence of a competent manager? This matter was directly considered in *Wigmore* v. *Jay* (1), where a foreman of the employer supplied an unsound scaffold pole which caused the death of a workman. In an action by the widow the employer eventually succeeded. This case was followed in *Cole* v. *De Trafford* (*No.* 2). (2) In that case Scrutton L.J. cited, in addition to *Wigmore* v. *Jay* (1), *Feltham* v. *England* (3), where a similar ruling had been given in the case of defective brick-work. The judgment of the Court (Cockburn C.J., Mellor and Shee JJ.) was delivered by Mellor J., who said: "There was nothing in the present case to show that the foreman was an incompetent or improper person to be employed as foreman or manager. We are unable to distinguish the case on this point from that of *Wigmore* v. *Jay* (1); *Gallagher* v. *Piper* (4); and *Skipp* v. *Eastern Counties Ry. Co.* (5)" He concluded: "With regard to the second ground relied upon on the part of the plaintiff, we can find no evidence of personal negligence to fix the master. There was nothing to show that he had employed unskilful or improper persons to build the piers."

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(1) [1907] 2 K. B. 646.
(2) 3 Macq. 288.
(3) (1854) 1 Macq. 748.
(4) L. R. 1 H. L. (Sc.) 326.
(5) L. R. 1 H. L. (Sc.) 332.

The decision which has given me the greatest difficulty is that of *Smith* v. *Baker*. (6) That was a case where the plaintiff sued under the Employers' Liability Act, 1880. He had been injured by a stone falling from a crane. The jury found that the machinery for lifting the stone was not reasonably fit for the purpose for which it was applied. The case turned largely upon the principle volenti non fit injuria, whether the whole risk was voluntarily incurred by the plaintiff. But Lord Halsbury said this: "The cases . . . . of

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(1) 5 Ex. 354.
(2) [1918] 2 K. B. 523.
(3) L. R. 2 Q. B. 33.
(4) (1864) 16 C. B. (N. S.) 669.
(5) (1853) 9 Ex. 223.
(6) [1891] A. C. 325.

Sword v. *Cameron* (1) and the *Bartonshill Coal Co.* v. *McGuire* (2) established conclusively the point for which they were cited, that a negligent system or a negligent mode of using perfectly sound machinery may make the employer liable quite apart from any of the provisions of the Employers' Liability Act." Now, the Employers' Liability Act had for its purpose the exclusion of the defence of common employment, and so the Lord Chancellor appears to say that common employment would not be a defence if the master were shown to have a negligent system or a negligent mode of using perfectly sound machinery. The real issue in *Smith* v. *Baker* (3) turned on whether it could be said that the plaintiff had agreed to incur the particular danger. Lord Watson (4) speaks of work "rendered dangerous by some defect which it was the duty of the master to remedy." But he is there discussing the degree of risk which a workman may be taken to assume, and I am not prepared, having regard to the issues in *Smith* v. *Baker* (3), to say that the rule laid down in *Wilson* v. *Merry* (5) and *Wigmore* v. *Jay* (6) was intended to have been modified or departed from in *Smith* v. *Baker*. (3) It is significant that *Wigmore's* case (6) was not cited to the House of Lords nor referred to in any of the speeches of the learned Lords. As I have said, *Wigmore's* case (6) has since been followed in this Court in *Cole* v. *De Trafford* (*No.* 2) (7), and the same principle has been applied by Finlay J. in the recent case of *Laubach* v. *Co-optimists' Entertainment Syndicate*. (8)

The case of *Toronto Power Co.* v. *Paskwan* (9) in the Privy Council is not very easy to reconcile with the decision of this Court in *Cole* v. *De Trafford* (*No.* 2). (7) I am certainly of opinion that the headnote to that case that "the duty towards an employee to provide proper plant, as distinguished from its subsequent care, falls upon the employer himself, and cannot be delegated to his servants" cannot be reconciled with the

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(1) 1 D. 493.
(2) 3 Macq. 300.
(3) [1891] A. C. 325.
(4) Ibid. 356.
(5) L. R. 1 H. L. (Sc.) 326.
(6) 5 Ex. 354.
(7) [1918] 2 K. B. 523.
(8) 43 Times L. R. 30.
(9) [1915] A. C. 734.

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authorities by which we are bound. Nor can I find in that case any such statement of the law as appears in the headnote. It is stated that the providing proper plant, as distinguished from its subsequent care, is especially within the province of the master rather than his servants. But this statement, which is followed by a statement that the master does not warrant the plant, and that if in the course of working a plant becomes defective and the defect is not brought to the master's knowledge, and could not by reasonable diligence have been discovered by him, the master is not liable, are all indications that the headnote to which I have referred is in no sense an accurate description of what was there decided. However that may be, whatever respect we may pay to this case in the Privy Council, the many authorities, both in the House of Lords and in this Court, appear to me to produce the result that in a case like this, where the master has chosen competent servants, and there is no allegation or finding to the contrary, to work with the plaintiff, and the plaintiff has been injured by some error on the part of those servants in not providing proper plant (there being no evidence of a defect in the machinery or plant which the employer knew or ought reasonably to have known), the doctrine of common employment applies and the plaintiff cannot recover. In Salmond on Torts, 7th ed., p. 130, occurs this passage: "The master cannot relieve himself of responsibility [of providing proper plant] merely by delegating it to a person who is incompetent for the task. But there is no rule of law that an employer, not guilty of any negligence himself, is nevertheless to be held liable because he was bound to supply plant." This statement appears to me accurately to state the law. For these reasons I am of opinion that this appeal must be allowed.

Appeal allowed.

Solicitors for appellant: *Steadman, Van Praagh & Gaylor.*
Solicitors for respondent: *Blacket Gill & Co.*

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JONESCO *v.* EVENING STANDARD COMPANY, LIMITED.

In re AN UNDERTAKING BY WINGFIELDS, HALSE AND TRUSTRAM, SOLICITORS.

[1928. J. 1349.]

Solicitor and Client—Costs—Agreement for Security—Sum to be recovered as Damages—Charge—Equitable Assignment—Oral Agreement—" Agreement respecting Amount and Manner of Payment "—Attorneys' and Solicitors' Act, 1870 (33 *&* 34 *Vict. c.* 28), *s.* 4.

By s. 4 of the Attorneys' and Solicitors' Act, 1870, amended by ss. 2 and 8 of the Solicitors Remuneration Act, 1881, a solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges, or disbursements in respect of contentious business done or to be done by the solicitor either by a gross sum or by commission or percentage, or by salary or otherwise, and either at the same or at a greater or at a less rate as or than the rate at which he would otherwise be entitled to be remunerated: Provided that the amount payable under the agreement shall not be received by the solicitor until the agreement has been examined and allowed by a Taxing Master:—

Held, that this section does not apply to an agreement by a client to give his solicitor security, whether by way of a charge upon or an assignment of part of a fund to be received by the solicitor, for the amount of costs to which upon taxation the solicitor may be found to be entitled; but that an agreement to that effect may be made orally and without any writing between solicitor and client.

Adjourned Motion by Yvonne Julia Jonesco, the wife of Barbu Jonesco, for an order that Messrs. George Arthur Wingfield and Lawrence Arthur Wingfield, practising as Wingfields, Halse & Trustram, solicitors, should fulfil an undertaking embodied in an order of the Court of Appeal dated April 16, 1930, made in an action of *Jonesco* v. *Evening Standard Co., Ld.*, 1928, J. 1349.

Messrs. Wingfields, Halse & Trustram (hereinafter called " Messrs. Wingfield ") had been acting for Barbu Jonesco as solicitors in a number of matters both contentious and non-contentious.

In July, 1929, they produced a statement showing his indebtedness to them at 2105*l.*, and during August and

September they were pressing him for payment without success.

In December, 1929, Barbu Jonesco was adjudicated a bankrupt. In February, 1930, he was plaintiff in two actions, one against the Evening Standard Company and the other against other defendants, in both of which he was claiming damages for libel. On February 10 he assigned to his wife, Yvonne Julia Jonesco, all sums awarded to him as damages in the libel actions "subject to the prior lien of Wingfields being preserved." On February 20 he recovered judgment against the Evening Standard Company for 12,000*l.* damages. The Court granted a stay of execution on condition that the money should be paid into Court and that notice of appeal should be given within fourteen days, which conditions were performed. On March 24, 1930, terms of settlement were agreed between the parties, by which the appeal was dismissed with costs, the 12,000*l.* in Court was to be paid out to the plaintiff's solicitors, Messrs. Wingfield, and the costs of the action were to be paid by the defendants when taxed. Differences then arose between Messrs. Wingfield, who contended that they were entitled to retain the 12,000*l.*, and the solicitors for Yvonne Julia Jonesco, who disputed the claim of Messrs. Wingfield to retain the whole amount.

On April 16, 1930, an application was made to the Court of Appeal on behalf of Yvonne Julia Jonesco that out of the sum of 12,000*l.* still standing in Court in the action the sum of 8000*l.* might be paid out to her. On that application the Court made the following order: "On the said Wingfields, Halse & Trustram undertaking to proceed with the taxation of the plaintiff's costs herein with all diligence and to account for the balance if any to the proper parties and Taylor, Jelf & Co. solicitors for the said Yvonne Julia Jonesco undertaking to discharge the claim of the Goldsmiths and Silversmiths Company, the trustees in bankruptcy of the plaintiff, and the costs of the said Yvonne Julia Jonesco and the amount due under the charge dated March 25, 1930, given by the said Yvonne Julia Jonesco to the said

Taylor, Jelf & Co. And by consent it is ordered that out of the said sum of 12,000*l.* and interest accrued if any standing in Court to the credit of this action the sum of 4500*l.* be paid out to the said Wingfields, Halse and Trustram and the further sum of 7500*l.* be paid out to the said Taylor, Jelf & Co. as specified in Part II. hereof."

On March 9, 1931, the solicitors for Yvonne Julia Jonesco served on Messrs. Wingfield notice of a motion in the Court of Appeal for an order that Messrs. Wingfield should fulfil their undertaking embodied in the order of April 16, 1930, to account to the proper parties for the balance of the sum of 4500*l.* paid out to them in pursuance of the said order and for an order that they should within four days pay to the said Yvonne Julia Jonesco the sum of 539*l.*, the balance in their hands of the said sum of 4500*l.*

Upon hearing counsel for Yvonne Julia Jonesco and for Messrs. Wingfield, the Court ordered that the motion should be referred to a Master of the King's Bench Division to inquire who were the proper parties to receive the balance referred to in the said order of April 16, 1930, and in what proportion, with power to refer questions of taxation only to the Taxing Master; the Master to have power to require the parties to serve notice of proceedings on any other persons appearing to be interested. Further consideration was adjourned to Court.

In pursuance of the order of April 8, 1931, Master Simner reported as follows (1) :—

1. The claims of the trustee in bankruptcy and of the Goldsmiths and Silversmiths Company have been satisfied. There remains only the claim of the applicant Yvonne Julia Jonesco. If there be a balance due, she is the proper person to receive it.

2. It is agreed by the parties that the amount of the balance to be accounted for and either paid by Messrs. Wingfield to Mrs. Jonesco or retained by them is to be taken at the sum of 980*l.* 14*s.* 10*d.* This figure is arrived at by taking

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(1) The report of the Master is not set out in full; those parts which do not bear upon the point decided by the Court are omitted.

the bill of costs of Messrs. Wingfield delivered at 3963*l.* 14*s.* 3*d.* as being (for the purpose of this application) a basic figure: the costs are untaxed, but the applicant desires a decision without waiting for the taxation to be completed.

3. The applicant advances two contentions:—

(*a*) That Messrs. Wingfield having delivered their full bill of costs as above, and having no possible claim in respect of the 980*l.* 14*s.* 10*d.*, can have no answer to her claim to that amount as all the other parties interested are satisfied.

(*b*) [The second contention is immaterial to this report.]

4. It is contended by Messrs. Wingfield that:—

(*a*) A verbal agreement was made in September, 1929, between Mr. Jonesco and Mr. Wingfield senior, that if his firm would go on with the conduct of two libel actions in which they were acting for him as plaintiff they could "deduct all the costs I owe you from the damages I recover."

(*b*) A verbal agreement to the same effect was made in November, 1929, also between Mr. Wingfield senior and Mr. Jonesco.

(*c*) [The third contention is immaterial to this report.]

5. The costs referred to in these alleged agreements may be taken as being (untaxed) about 2100*l.* Since their claim for that sum was made Messrs. Wingfield have received 1036*l.* 17*s.* 8*d.*, leaving a balance claimed by them of about 1060*l.*

6. If any of the agreements is established and can be supported as binding on the other party in law this balance overtops the amount of 980*l.*, the subject of this application.

In September, 1929, there was an interview at which Mr. Wingfield states that Mr. Jonesco made the verbal arrangement with him set out above. This Mr. Jonesco strongly denies.

On November 21, 1929, a meeting of creditors was called at the office of Mr. Jonesco's new solicitors. Mr. Wingfield states that he had an interview with Mr. Jonesco outside the office, at which he asked him to go on with the libel actions.

[Quoting the words of Mr. Wingfield :] " He " (Mr. Jonesco), " said it was in my interest to do this, so as to pay whatever was owing to me out of the damages."

Mr. Jonesco admits having the interview, but denies that any reference was made to costs.

Messrs. Wingfield continued to act as his solicitors in the two actions.

In December Mr. Jonesco was adjudicated a bankrupt.

On February 10, 1930, he assigned to Mrs. Yvonne Julia Jonesco all sums awarded to him as damages in the libel actions, " subject to the prior lien of Wingfields being preserved."

On February 20 judgment was given for Mr. Jonesco for 12,000*l.* A stay of execution was granted and the 12,000*l.* was paid into Court.

7. Upon these facts the following questions arise :—

(1) [Not material to this report.]

(2.) Were the three alleged agreements or any of them made, and if so are they or any of them effective in law ?

(*a*) The agreement of September, 1929. This is denied by Mr. Jonesco ; it was not mentioned by Mr. Wingfield senior to his partner until May, 1930 ; he made no effort to have it in writing ; he can produce no note of it made at any time ; it is not referred to in any affidavit of his filed in these proceedings. On the other hand, he states that the word lien in the assignment of damages made in February, 1930, covers this arrangement ; the whole probabilities are in favour of his having tried to make such an arrangement, as evidenced by the correspondence preceding it and the financial position of his client. He asserts very positively that it was made.

I accept his evidence.

(*b*) The agreement of November, 1929. I accept his version of this conversation, but cannot but think that the occasion chosen was an unfortunate one. Mr. Jonesco was being advised by another solicitor, and was in a desperate position financially ; his creditors were meeting within a few yards of the conversation. I do not consider that it amounts to a contract on which he can rely—at most it

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corroborates the making of the previous arrangement; "he said it was in my interest (to go on with the actions) so as to pay what was owing me out of the damages."

(*c*) [Not material to this report.]

(*d*) There remains only the validity of the bargain of September, 1929. It was in respect of costs of matters both contentious and non-contentious; it is not in writing; it is not signed by the client; it is not champertous in my view. It is contended that it is enforceable as creating an equitable lien, and I was referred to vol. xix., s. 34, of Halsbury's Laws of England; but such a lien appears to be limited to the fruits obtained "in the suit for the costs of that suit." The costs of the suit have been paid up to 1036*l.* 17*s.* 8*d.*, and a full bill delivered for the remainder covered by the aforementioned sum of 3963*l.* 14*s.* 3*d.* The remainder of the pre-bankruptcy costs relate to matters largely of a non-contentious nature, and are secured by the mortgage. [A mortgage dated July 1, 1929, made between Barbu Jonesco and Messrs. Wingfield.]

I am of opinion that this contention fails.

If that be the right view of the validity of this bargain, Messrs. Wingfield's claim to the balance fails, and Mrs. Jonesco is entitled to it; if it be the wrong view, Mrs. Jonesco fails to establish that there is any part of the 4500*l.* for which Messrs. Wingfield are liable to account to her or to anyone else.

P. R. SIMNER. July 27, 1931.

Conway K.C. and *Sandlands* for Yvonne Julia Jonesco, applied for payment of the sum of 539*l.* by Messrs. Wingfield, in accordance with the Master's finding.

Croom-Johnson K.C. and *H. Bensley Wells* for Messrs. Wingfield. The Master has held that the agreement of September, 1929, was unenforceable, being apparently of opinion that in order to be valid it must be in writing, by reason of s. 4 of the Attorneys' and Solicitors' Act, 1870. (1)

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(1) Attorneys' and Solicitors' Act, 1870 (33 & 34 Vict. c. 28), s. 4: "An attorney or solicitor may make an agreement in writing with his client respecting the amount and manner of payment

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That section refers only to the amount of costs recoverable by a solicitor from his client and to agreements purporting to agree the amount. It has no bearing upon the question whether a security may be given for an amount which has been or may be duly ascertained after taxation according to law.

[Cordery on Solicitors, 3rd ed. (1899), pp. 260–263, was cited.]

Conway K.C. in reply. Sect. 4 of the Attorneys' and Solicitors' Act, 1870, applies not only to "the amount" but to "the manner of payment." The latter words would include the giving of a security for the payment; the security might be offered and accepted in payment.

SCRUTTON L.J. [after stating the facts, continued:] The matter now comes to this Court on the report of the Master. The Master makes a very careful report. He finds that certain claims have been satisfied. There may be other claims on the fund in the hands of the solicitors. If there are he does not deal with them. He deals with the matter as between Mrs. Jonesco and the solicitors, Messrs. Wingfields, Halse & Trustram. With regard to the balance referred to in the order of April 16, 1930, he says: "It is agreed by the parties

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for the whole or any part of any past or future services, fees, charges, or disbursements in respect of business done or to be done by such attorney or solicitor, whether as an attorney or solicitor or as an advocate or conveyancer, either by a gross sum, or by commission or percentage, or by salary or otherwise, and either at the same or at a greater or at a less rate as or than the rate at which he would otherwise be entitled to be remunerated, subject to the provisions and conditions in this part of this Act contained: Provided always, that when any such agreement shall be made in respect of business done or to be done in any action at law or suit in equity, the amount payable under the agreement shall not be received by the attorney or solicitor until the agreement has been examined and allowed by a taxing officer of a court having power to enforce the agreement; and if it shall appear to such taxing officer that the agreement is not fair and reasonable he may require the opinion of a court or a judge to be taken thereon by motion or petition, and such court or judge shall have power either to reduce the amount payable under the agreement or to order the agreement to be cancelled and the costs, fees, charges, and disbursements in respect of the business done to be taxed in the same manner as if no such agreement had been made."

that the amount of the balance to be accounted for and either paid by Messrs. Wingfield to Mrs. Jonesco or retained by them is to be taken at the sum of 980*l*. 14*s*. 10*d*." He then makes a number of other findings and thereby reduces the matter which this Court has to decide to one question. Messrs. Wingfield say: True there is a balance of 980*l*. 14*s*. 10*d*. out of the 4500*l*. paid out to us; but in September, 1929, before the assignment to Mrs. Jonesco subject to our lien, Mr. Jonesco had made this agreement with us, that we could deduct all the costs he owed us from the damages he recovered in his action for libel. Messrs. Wingfield say that this agreement is apart altogether from the costs in the action, for which there would obviously be a solicitor's lien upon the damages recovered, and that the costs, the subject of the agreement, consisted of a sum of 1060*l*. previously incurred in matters partly contentious and partly non-contentious. They further say that this agreement constituted an equitable lien upon the damages in the libel action to the amount of that sum, or an equitable assignment of that amount out of those damages, which takes priority to the assignment to Mrs. Jonesco, which in terms was made subject to Messrs. Wingfield's lien.

The first answer of Mrs. Jonesco to this contention is that no such agreement was ever made. The Master, after hearing the evidence on both sides, has found that the agreement was made; but that it was not in writing. Presumably for that reason, though he does not in terms say so, he holds that it is not enforceable. He concludes his report with these words: "It is contended that it"—the agreement—"is enforceable as creating an equitable lien. . . . . I am of opinion that this contention fails. If that be the right view of the validity of this bargain, Messrs. Wingfield's claim to the balance fails, and Mrs. Jonesco is entitled to it; if it be the wrong view, Mrs. Jonesco fails to establish that there is any part of the 4500*l*. for which Messrs. Wingfield are liable to account to her or to any one else." That is the question raised by counsel for Messrs. Wingfield, and the only question we are now considering.

Before the Attorneys' and Solicitors' Act, 1870, many agreements between client and solicitor could be made orally, without any writing; for instance, a solicitor could orally agree to charge nothing for his services. In *Philby* v. *Hazle* (1) Erle C.J. said: "The inclination of the cases is, that an agreement whereby the attorney was to get a larger sum than the ordinary allowance cannot be enforced"—leaving enforceable an agreement although not in writing whereby the solicitor was to get a less sum than he ordinarily would. Then came the Act of 1870, which originally applied to contentious and non-contentious business, but from which non-contentious business was excluded by an Act of 1881. In my view the Act of 1870 in s. 4 only deals with agreements between solicitor and client fixing the amount of payment to be made by the client and the manner in which that amount may be paid. It provides that "An attorney or solicitor may make an agreement in writing with his client respecting the amount and manner of payment . . . . either by a gross sum, or by commission or per-centage, or by salary or otherwise, and either at the same or at a greater or at a less rate as or than the rate at which he would otherwise be entitled to be remunerated," subject to examination and allowance of the agreement by an officer of Court. The section is not dealing with securities given for the amount properly payable to the solicitor. An agreement between solicitor and client by which the client is to pay the solicitor, not a sum fixed by the agreement, but the proper amount found due to him on taxation and to give security for the payment of that amount, either, when the amount has been ascertained, by a promissory note, or, as in the present case, by means of a lien upon or an assignment of part of a sum which the solicitor is to receive on behalf of his client—such an agreement does not come within the provision in s. 4 of the Act of 1870 requiring certain agreements between solicitors and their clients to be in writing, but may be made orally, without writing. Consequently the agreement in this case, which

(1) (1860) 8 C. B. (N. S.) 647, 652.

the Master finds to have been made, although not in writing, is nevertheless enforceable. The question submitted for the opinion of the Court must be answered in favour of Messrs. Wingfield. In that case there is, as the Master finds, no balance left to which Mrs. Jonesco has any claim, and it must be held that Messrs. Wingfield have accounted, according to their undertaking, to the proper persons.

GREER L.J. I am of the same opinion. Out of the complications which have arisen concerning the sum of 12,000*l.* recovered by Mr. Jonesco as damages for libel in his action against the Evening Standard Company, the only question for our consideration to-day is whether the agreement of September, 1929, to which the Master refers in paragraph 4 (*a*) of his report and which he finds to have been made in paragraph 7 (2.) (*a*) towards the end of the report, is an agreement which is or is not binding. Mrs. Jonesco contends that it is not binding by reason of the provisions of s. 4 of the Attorneys' and Solicitors' Act, 1870. If it is binding it seems clear that the 980*l.* 14*s.* 10*d.* remaining in the hands of Mr. Jonesco's solicitors out of the sum of 4500*l.* which this Court ordered to be paid to them will be exhausted by the deduction provided for by the agreement. It is thus stated by the Master: "A verbal agreement was made in September, 1929, between Mr. Jonesco and Mr. Wingfield senior that if his firm would go on with the conduct of two libel actions in which they were acting for him they could 'deduct all the costs I owe you from the damages I recover.'" There can be no question that as regards the costs incurred on behalf of Mr. Jonesco in the litigation itself, apart from any agreement, they would have the usual solicitor's lien. The question is whether they were given an additional lien in respect of the costs which were owing in September, 1929, when this agreement was entered into. These included costs which had been incurred in the course of litigation and also costs of non-litigious matters. If this agreement created a lien it is binding on Mr. Jonesco even if it is only an equitable lien, and would admittedly be binding on Mrs. Jonesco, who subsequently took her

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assignment of the damages subject to the lien of the solicitors. The sole question is whether it is unenforceable by reason of the provisions of s. 4 of the Attorneys' and Solicitors' Act, 1870.

Before that Act a solicitor could not hold his client to bargain to pay more than the taxed costs, though there might be an effective bargain that less than the taxed costs should be paid. Sect. 4 of the Act provided that "Any attorney or solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges, or disbursements in respect of business done .... either by a gross sum, or by commission or per-centage, or by salary or otherwise" .... Three methods are referred to expressly and in particular: gross sum, commission or per-centage, and salary. Those methods are methods which affect the amount which a solicitor is to receive, and I regard the words "or otherwise" as also relating to some method by which the amount of the costs payable by the client is to be ascertained. The section goes on "and either at the same or at a greater or at a less rate as or than the rate at which he would otherwise be entitled to be remunerated, subject to the provisions and conditions in this part of this Act contained." It seems to me clear from its wording that this section is confined to agreements which in some way or other fix a measure of payment of a solicitor's bill different from the amount of his taxed costs, and that the section has no application to an agreement to give a lien on some of the client's property in respect of costs already ascertained or to be ascertained on taxation I think the only way in which the agreement under discussion can be made effective is to treat it as an agreement for a lien on the amount recovered in the actions in respect of the costs due at the date of the agreement, because it cannot be denied that damages awarded by a verdict and judgment are not payable to the solicitor; they are payable to the client. This Court has often refused to order that money in Court shall be paid out to the solicitor of the party entitled to it. But a solicitor may have, and usually has, a lien upon it for his charges, and he is entitled to enforce that lien. If he has an additional lien given to him by agreement this Court ought to enforce that lien also; and, considering the terms in which the inquiry was referred to the Master, he was entitled and I think bound to say that the 980*l.* 14*s.* 10*d.* should be retained in the hands of the solicitors to meet their lien; and, as it is quite certain that that sum will be less than enough to satisfy the lien, there is no reason why they should not retain the whole of it.

I agree with the judgment which has just been delivered and should have been quite content to say so and add nothing; but, inasmuch as the question is one of first impression and of considerable importance, I have thought it desirable to add my opinion, if indeed I can add anything to the authority of any judgment of Lord Justice Scrutton.

ROMER L.J. I agree. In my opinion s. 4 of the Solicitors Act, 1870, has no application to the agreement which according to the Master's finding was come to between Mr. Jonesco and the solicitors in September, 1929. The true effect of that section is that where a solicitor and his client desire that the solicitor shall be remunerated for past or future services not in the normal way but by being paid, for instance, a fixed sum (in which case they will enter into an agreement as to the amount) or by being paid, say, by means of a salary or commission or per-centage (in which case they will enter into an agreement as to the manner of payment), such an agreement must be in writing. The section has no application at all to a case like the present where the solicitor is remunerated in the normal way, but an agreement is made whereby the remuneration, when it is ascertained, is to be paid out of a particular source. I add this only to avoid any misapprehension of what we are deciding. As Scrutton L.J. has stated, the solicitors received out of the 12,000*l.* paid into Court for damages a sum of 4500*l.* That 4500*l.* was paid to them because they were entitled to a lien on the 12,000*l.* as being the fruits of the judgment recovered by their client through their services. No one knew at that time the exact amount of their claim for costs as between solicitor and client against Mr. Jonesco, and so 4500*l.* was paid out to them, they undertaking to account for the balance that might remain of the 4500*l.*, after the costs as between solicitor and client had been ascertained, to the persons who might be entitled thereto. For the purposes of this case that balance has been agreed at 980*l.* 14*s.*, and now the only question is whether that sum should be paid to Mrs. Jonesco and those persons to whom apparently she has given charges on the balance since the undertaking was entered into ; or whether the 980*l.* 14*s.* shall be retained by the solicitors in consequence of a lien or equitable charge or equitable assignment made in their favour of that sum for the purpose of securing payment to them of costs incurred not in this action but in respect of other matters, contentious and non-contentious, in which they had previously been acting for Mr. Jonesco. Now it appears that the solicitors have been paid in respect of the costs of the action a sum of 1036*l.* 17*s.* 8*d.* from another source ; but that has been paid to them by virtue of the judgment which was obtained by Mr. Jonesco against the Evening Standard Company in respect of costs, and the benefit of that judgment was never assigned to Mrs. Jonesco. The effect of that payment to them may be to give some right of marshalling securities or other relief, but that is not a right with which we have anything to do, because it does not arise under or by virtue of the undertaking given in April, 1930, or the order that was then made.

SCRUTTON L.J. The order of the Court is that the solicitors have fulfilled their undertaking. The motion therefore fails.

Motion dismissed.

Solicitors for Mrs. Jonesco : *Taylor, Jelf & Co.*
Respondents : *Wingfields, Halse & Trustram.*

W. H. G.

POWSZECHNY BANK ZWIAZKOWY W POLSCE *v.* PAROS.

C. A.
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[1931. P. 2832.]

Practice—Liquidated Claim—Specially indorsed Writ—Bill of Exchange—Fraud in Negotiation—Evidence of Value and Good Faith—Summons for Judgment—Affidavit of Plaintiff—Sufficiency—Triable Issue—Leave to Defend—Power of Court or Judge to impose Conditions—Rules of Supreme Court, 1883, *Order* XIV., *r.* 6.

In an action brought on a writ specially indorsed under Order III., r. 6, by indorsees against the maker of a promissory note, the plaintiffs in an affidavit in support of a summons for leave to sign final judgment under Order XIV., r. 1, stated that they were holders in due course of the note, having taken it in good faith for value from the payees without notice of any defect in their title. The defendant in his affidavit in answer stated facts which, if true, showed that the note had been negotiated in fraud of him. The judge in Chambers made an order, under Order XIV., r. 6, that the defendant should have leave to defend the action if he brought a sum of money into Court within a certain time, but that if he failed to do this, the plaintiffs should have leave to sign judgment for the amount claimed. On appeal from this order:—

Held, that a triable issue was raised between the parties; that the mere statement in the plaintiffs' affidavit that they had given value without notice of any defect in their indorsers' title was not sufficient to decide that issue in the plaintiffs' favour, but that the Court must have an opportunity of deciding it, and that therefore the defendant was entitled to leave to defend the action without the condition that he should pay money into Court.

Held, by Greer L.J., and *semble* by Slesser L.J., that, where a defendant is entitled to leave to defend, the judge in Chambers cannot under Order XIV., r. 6, make an order for conditional leave to defend, the effect of which is to give the plaintiff conditional leave to sign judgment.

Fuller v. *Alexander* (1882) 47 L. T. 443 and *Millard* v. *Baddeley* (1884) W. N. 96 approved.

Kodak, Ld. v. *Alpha Film Corporation* [1930] 2 K. B. 340 distinguished.

APPEAL from an order of Charles J. in Chambers varying an order of Master Bonner and ordering that the defendant should have leave to defend an action for a liquidated claim if he paid into Court 150*l.*, but that otherwise the plaintiffs should be at liberty to sign final judgment.

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Powszechny Bank Zwiazkowy W Polsce v. Paros.

The action was brought on a writ specially indorsed under Order III., r. 6, of the Rules of the Supreme Court by the plaintiffs as indorsees of a promissory note for 200*l.* dated January 30, 1931, payable on September 10, 1931, to Messrs. J. Klein & Son, who indorsed it to the plaintiffs. The amount claimed, including interest and notarial expenses, was 201*l.* 16*s.* 3*d.*

On an application for leave to sign final judgment under Order XIV., r. 1, the plaintiffs filed an affidavit, stating that they were "holders in due course" of the promissory note "within the meaning of ss. 29 and 38 of the Bills of Exchange Act, 1882, having taken the said note in good faith, and for value from the said J. Klein & Son, without notice of any defect in their title." The consideration for the note was stated to be 8.087.50 Zloty in Polish currency, the equivalent of 200*l.* sterling, less discount and postage charges.

The defendant, who was an india-rubber merchant carrying on business in Cable Street, London, E. 1, filed an affidavit in answer stating that in January, 1931, he had large dealings in timber with J. Klein & Son, who had asked him to give them the note sued on, and that he had given it upon condition that it was to be deposited with the Bank Handlowy of Warsaw, the bankers of J. Klein & Son, to help J. Klein & Son to finance the transactions, and upon their promise not to discount it elsewhere than with the bank who were financing them; that J. Klein & Son had failed to deliver any goods against the note and that he, the defendant, had received no consideration for it; that J. Klein & Son had fraudulently indorsed the note to the plaintiffs who were not the bankers financing the transactions; and he relied upon s. 30 of the Bills of Exchange Act, 1882 (1), as imposing upon the plaintiffs the burden of proving that they had taken the note in good faith and for value.

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(1) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 30, sub-s. 2: "Every holder of a bill is prima facie deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill."

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Master Bonner ordered that the defendant should have leave to defend, and gave directions as to the mode of trial. On appeal to the judge in Chambers, Charles J. varied the Master's order, and made an order giving the defendant leave to defend the action if he brought 150*l.* into Court within one month from January 15, 1932, the date of this order, but that if that sum were not so paid, the plaintiffs should be at liberty to sign final judgment for the amount claimed.

The defendant appealed and asked that the Master's order should be restored and that he should have unconditional leave to defend.

Constantine Gallop for the appellant. In an action on a bill of exchange or promissory note negotiated in fraud the burden of proof is on the holder to prove both that value has been given, and that it has been given in good faith without notice of the fraud: Bills of Exchange Act, 1882, s. 30. An affidavit by the plaintiff stating that he is the holder for value is not sufficient to deprive the defendant of the right to put the plaintiff to his proof, by parol evidence or by documents, that he has given value. The Court ought to have the opportunity of seeing what is the truth of the matter: *Fuller* v. *Alexander.* (1) There is no power under Order XIV. to decide the issue between the parties: *Millard* v. *Baddeley.* (2)

H. C. Marks for the respondents. The affidavit of the appellant under Order XIV. is inconsistent and unsatisfactory. First he says the note was given on condition that it should be deposited with the Bank Handlowy of Warsaw and be applied in financing purchases of timber. Then he verifies a letter in which he says the condition was that it should go through J. Klein & Son's own bank for their own use. In view of these inconsistencies the learned judge was entitled to impose conditions before the appellant should have leave to defend: *Blaiberg* v. *Abrams.* (3) It is clear from the judgment of Greer L.J. in *Kodak, Ld.* v. *Alpha Film*

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(1) 47 L. T. 443, 444.

(2) (1884) W. N. 96.

(3) (1884) 77 L. T. Jour. 255.

Corporation (1) that under Order xiv., r. 6, conditions may be imposed upon a defendant even when the plaintiff may not be entitled to sign final judgment.

Gallop was not called upon to reply.

Scrutton L.J. I do not propose to enter upon a discussion of *Kodak, Ld.* v. *Alpha Film Corporation.* (2) I confine myself to this case, which is an application under Order xiv. for leave to sign judgment on a claim upon a promissory note. The Master thought the defendant was entitled to leave to defend. The judge ordered that he should have leave to defend if he brought money into Court, but that unless he did so the plaintiffs should have leave to sign judgment. The defendant appeals.

The plaintiffs are a Polish Bank suing on a promissory note. The defence is that the note was given to J. Klein & Son, with whom the defendant had dealings in timber, upon the terms only that they should negotiate the note with their own bank and not otherwise; and that J. Klein & Son in breach of that condition indorsed the note to the plaintiffs. Therefore, he contends, under s. 30 of the Bills of Exchange Act, 1882, the negotiation of the note being affected with fraud, the plaintiffs cannot make good their claim to be holders in due course unless and until they prove that subsequently to the fraud value has in good faith been given for the note—that is to say, in this case, that they have given value for it in good faith. The plaintiffs contend that they have proved this, because they say in their affidavit under Order xiv. that they are holders in due course of the bill within the meaning of ss. 29 and 38 of the Bills of Exchange Act, 1882, "having taken the said note in good faith and for value from the said J. Klein and Son."

Early in the history of Order xiv. a question arose about the effect of a statement in a defendant's affidavit which, if true, would entitle him to defend. In *Fuller* v. *Alexander* (3) the plaintiffs had made an affidavit stating that the defendants were justly and truly indebted to them in an amount due on the defendants' dishonoured acceptance. It was agreed between counsel on both sides that this affidavit should be taken as though it contained a statement by the plaintiffs that they were bona fide holders for value of the bill. Denman J. said: "Now, assuming that the plaintiffs had stated in their affidavit that they had given consideration for the bill and were bona fide holders of it, I apprehend that an affidavit to that effect could not authorize us to allow judgment to be signed against the defendants, or hamper them by ordering them to bring the whole or a substantial amount into Court. . . . . The Court ought to have the opportunity of seeing what is the truth of the matter, and that the defendants are liable; and it would be proper for a jury to try the issues between the parties." That was in 1882. In 1884 the case of *Millard* v. *Baddeley* (1) came before Field J., who, as the profession ought to know and remember, was the judge chosen to undertake the first sittings in Chambers under the then new Rules of the Supreme Court, 1883, by sitting for a period continually in Chambers. (2) *Millard* v. *Baddeley* (1) was an appeal by the defendants from an order of a District Registrar upon a summons under Order XIV. The action was on a bill of exchange. The defendant's affidavit stated that the bill was originally obtained from him by fraud. The plaintiff alleged that he was a bona fide holder for value. After an investigation lasting four days the District Registrar made an order for judgment. Field J. said: "It has been settled law for nearly twenty years that where there is fraud in the inception of a bill, there is no longer a presumption that value has been given and the onus of proof is shifted. Where a defendant says that a bill was obtained from him by fraud, and that he therefore desires to have the fact that value was given by the plaintiff strictly proved, there is no power upon a summons under Order XIV. to test the story of either party. It ought only to be in an exceptional case that the power given by this rule of examining the parties is exercised. It is the first time I ever heard of its being done. If it became a practice it would lead to great expense, and to actions being tried upon the summons under Order XIV., which was never intended to be done." The appeal was allowed and the defendants had leave to defend. In *Blaiberg* v. *Abrams* (1) the judge in Chambers had refused the defendant leave to defend except upon payment of the sum claimed into Court. There was evidence of facts so inconsistent with those alleged in the defendant's affidavit in answer to the claim that it was difficult to believe that he had any defence. The judgment of Bowen L.J. is reported as follows: "It was not disputed that the plaintiff had given full consideration for the bills, and, on the other hand, the defence sworn to was prima facie sufficient, that the bills were given under a certain condition as to their application. But at the trial the defendant, in order to sustain his defence, would have to show that the plaintiff had notice of this, and there were materials from which the Court could judge as to the probability of his being able to do this. It appeared that when the bills became due and the defendant was applied to he made no reply, and that when they were presented at his bankers the answer was 'arranged with drawer,' which was quite inconsistent with the defence now set up, and which was never set up until . . . . proceedings were taken for judgment. Under these circumstances, though the case came very near the line, and was one very difficult to decide, upon the whole the circumstances were such that he could not say that the judge at Chambers was wrong, and, as he was not satisfied that the defence was bona fide, he did not think that it ought to be set up unless the money was brought into Court or security given." In that case the Court of Appeal not being satisfied as to the bona fides of the defendant's affidavit declined to interfere with the order of the judge. In *Edwards* v. *Davis* (2) the Court were of opinion that the defendant's affidavit disclosed no defence. From those days to the present time it has been the continued practice not to accept the mere statement on affidavit of the plaintiff that he gave value, where the defendant shows that there was

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(1) [1930] 2 K. B. 340, 351, 352.

(2) [1930] 2 K. B. 340.

(3) 47 L. T. 443, 444.

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(1) (1884) W. N. 96.

(2) See 75 L. T. Jour. 401.

(1) 77 L. T. Jour. 255.

(2) (1888) 4 Times L. R. 385.

fraud in the negotiation of the bill. In the present case I think there is a prima facie case of fraud shown on the defendant's affidavit. The mere statement in the plaintiffs' affidavit that they took the note in good faith and for value is not sufficient to decide that issue in their favour. In my opinion when a defendant presents a prima facie case of fraud in the plaintiff, the Court ought to act on that and give him leave to defend without imposing the condition that he should pay money into Court. The appeal must be allowed and the order of the Master restored.

Greer L.J. I am of the same opinion. It has long been the rule that in proceedings under Order xiv. what the Court, whether this Court or the King's Bench Division, has to ascertain is whether there is a triable issue. If there is, no matter how strongly the Court may anticipate that it will be decided in the plaintiff's favour, it must order a trial. I have always thought that this rule deprives Order xiv. of much of the remedial effect which the Legislature intended it should have; but we cannot treat the order as tabula rasa upon which we may now begin to re-write. We are bound after this period by the view expressed by Denman and Manisty JJ. in *Fuller* v. *Alexander*. (1) If that had been a recent case it might have been open to this Court to disagree with the decision; but it was decided in 1882 and came under consideration in the Court of Appeal in 1883, and from that time to the present it has never been suggested that the rule there laid down was not the right rule to apply. Year after year Masters hearing summonses and judges hearing appeals in Chambers have uniformly applied the law as laid down by Denman J. in that case; and it would not be right for this Court now to alter a practice which has been followed for so long. All the defendant need say is that he requires the plaintiff to prove his case, and the law puts upon the plaintiff the onus of proving it. When the defendant says he does not admit the claim he need not carry the case any further than to say: "There is a triable issue and I want to have it tried." In the present case the defendant has said that; and so the learned judge could not properly enter judgment for the plaintiffs; and not being able to enter judgment for the plaintiffs he could not do so conditionally. I have been pressed by words I used in *Kodak, Ld.* v. *Alpha Film Corporation.* (1) They have no application to this case. A direction under Order XIV., r. 6, that the case shall be tried in a particular manner, or that the defendant shall give security, is not, like the order made by the learned judge in the present case, an order that the plaintiff shall have judgment if the direction is not complied with. If that were the effect of such a direction, it would enable a judge to give judgment for the plaintiff in a case where the defendant was entitled to defend. Order XIV., r. 6, applies where the judge cannot give the plaintiff leave to sign final judgment. Where that cannot be done at all, it cannot be done conditionally. That principle is not affected by a case where, the defendant having leave to defend, a direction is given that the case shall be entered in a special list, or shall be tried before a judge alone, or that the defendant shall give security; none of which directions involve giving judgment for the plaintiff conditionally in a case where he ought not to have judgment at all.

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(1) 47 L. T. 443.

Slesser L.J. I agree. As I understand the argument of Mr. Marks, he does not seek to question the law laid down by *Fuller* v. *Alexander* (2), that where a defendant, being sued on a bill of exchange, gives prima facie proof that the negotiation of the bill was affected by fraud, the plaintiff is then called upon to prove that he gave value for the bill in good faith, and that by merely stating in his affidavit in interlocutory proceedings that he is the holder in due course of the bill "having taken the same in good faith and for value" he does not satisfy that requirement. As Denman J. said in that case: "The Court ought to have the opportunity of seeing what is the truth of the matter, and that the defendants are liable; and it would be proper for a jury to try the issues between the parties." So far there is no difference between counsel on one side and on the other. Mr. Marks does however contend that the defendant has failed to show any substantial case of fraud so as to bring the matter within s. 30 of the Bills of Exchange Act, 1882, at all. Upon that point I should like to say that, whether the condition upon which the note was given was that it should only be negotiated through the bankers of Messrs. J. Klein for their benefit generally, or whether it was to be used exclusively for the purpose of financing certain transactions in timber, in either case Mr. Marks cannot maintain that there was no triable issue between the parties. If so, the issue must be tried. In *Kodak, Ld.* v. *Alpha Film Corporation* (1) the question was whether directions as to how a case should be tried, whether by a judge alone, or by a judge and jury, or as a short cause, could be imposed upon a defendant who was entitled to leave to defend. In that case I said (2): "But the reasoning in *Jacobs*' case (3) does not seem to me to have application to a case where the condition made is, as in the present cases, merely procedural as to time or mode of trial." Greer L.J. said (4): "All that was meant by the decision in *Jacobs*' case (3) is that, where a defendant is entitled to defend, an order cannot be made upon him that, if he does not comply with a prohibitive condition, judgment shall go against him." In my opinion there is a triable issue, and that issue must come before the Court, where the defendant relies on s. 30 of the Bills of Exchange Act, as he does in this case. It follows that the learned judge was wrong in ordering money to be paid into Court as a condition of giving the defendant leave to defend, and giving the plaintiffs leave to sign judgment if that condition was not complied with. The order of the Master must be restored and the appeal allowed.

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(1) [1930] 2 K. B. 340.

(2) 47 L. T. 443.

Greer L.J. I wish to add that in the passage read by my brother Slesser from my judgment in *Kodak, Ld.* v. *Alpha*

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(1) [1930] 2 K. B. 340.

(2) Ibid. 363.

(3) *Jacobs* v. *Booth's Distillery Co.* (1901) 85 L. T. 262.

(4) [1930] 2 K. B. 353.

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Film Corporation (1) I used the word "prohibitive" as applied to "condition," because I was referring to *Jacobs'* case (2), where the condition imposed was in fact prohibitive. The sentence would equally well express my opinion if the word prohibitive were deleted.

Appeal allowed.

Solicitors for appellant: *Maurice Cohen & Co.*

Solicitors for respondents: *Michael Abrahams, Sons & Co.*

W. H. G.

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Jan. 11, 12, 13, 14; *Feb.* 8.

COMMISSIONERS OF INLAND REVENUE *v.* SNEATH.

Revenue—Super Tax—Lunatic—Remuneration of Committee—Lunacy Percentage—Deductions—Earlier Decision of Special Commissioners—Res Judicata—Lunacy Act, 1890 (53 *Vict. c.* 5), *s.* 148—*Lunacy Rules,* 1892, *r.* 133—*Income Tax Act,* 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *ss.* 7, 121, 148.

Payments out of the income of a lunatic of his committee's remuneration and of the lunacy percentage on his clear annual income payable to the Court under s. 148 of the Lunacy Act, 1890, and the Lunacy Rules, 1892, r. 133, cannot be deducted from a lunatic's gross income for the purpose of an assessment to super tax.

Committee of A. B. v. *Simpson* (1928) 14 Tax Cas. 29 applied.

A decision of the Commissioners for the Special Purposes of the Income Tax Acts in assessing super tax for a previous year that the above deductions can be made does not operate as a res judicata to prevent a contrary decision in assessing super tax for a later year.

Aylmer v. *Mahaffy* (1925) 10 Tax Cas. 594 not followed.

Inland Revenue Commissioners v. *Brooks* [1915] A. C. 478 applied.

So *held* by the Court of Appeal (Lord Hanworth M.R., Greer and Romer L.JJ.), reversing a decision of Rowlatt J. on the latter point.

Per Lord Hanworth M.R. and Greer L.J.: The determination by Special Commissioners of the amount of an assessment to super tax is not a decision of a lis inter partes so as to create an estoppel by way of res judicata. The assessment is final and conclusive between the parties only in regard to the assessment for the particular year for which it is made.

Per Romer L.J.: The decision of the Special Commissioners upon any incidental question of fact or law, however necessary it may be for the purpose of ascertaining the income for the year of assessment, cannot be conclusive in reference to the ascertainment of the taxpayer's income for any subsequent year of assessment.

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(1) [1930] 2 K. B. 353.

(2) 85 L. T. 262.

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INLAND REVENUE COMMISSIONERS v. SNEATH.

APPEAL from a decision of Rowlatt J. on a case stated under the Income Tax Act, 1918, by the Special Commissioners for the purposes of the Income Tax Acts.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts, held on July 24, 1929, William Cecil Sneath (hereinafter called "the committee"), as committee for D. G. M., a person of unsound mind (hereinafter called "the patient"), appealed against an assessment to super tax in the sum of 4885*l.* for the year ending April 5, 1929, made upon him under the provisions of the Income Tax Acts.

2. By Order in Lunacy, dated November 25, 1913, the custody, regulation, occupation, disposition, and receipt of the estate of the patient were committed and granted to the committee, and from that date the committee has at all times acted as committee of the said estate. The committee has been allowed by the Court remuneration at the rate of 50*l.* per annum for so acting, and by the above mentioned order he is required to give security in the sum of 6000*l.* Such security is given by way of a guarantee bond, the premium on which, amounting to 18*l.* per annum, is also paid out of the income of the patient's estate.

3. Under the provisions of s. 148 of the Lunacy Act, 1890, and the Rules made thereunder (which, so far as material, are set out in the case of the *Committee of A. B.* v. *Simpson* (1)), a lunacy percentage at the rate of 4 per cent. per annum on the clear annual income is payable to the Court. The percentage paid in respect of the patient's estate for the year ending April 5, 1928, amounted to 136*l.*

4. On October 21, 1918, the committee appealed to the Special Commissioners against the assessments to super tax made upon him as committee of the patient's estate for the years 1914–15, 1915–16, 1916–17, and 1917–18, on the ground that the lunacy percentage and committee's remuneration paid for the years material to those assessments did not form part of the patient's income for the purposes of super tax, and ought to be allowed as deductions from the gross

(1) 14 Tax Cas. 29.

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income of the estate in computing the patient's income for the purposes of super tax. The Commissioners who heard the appeal on that occasion held that the lunacy percentage and committee's remuneration did not form part of the patient's income, and reduced the assessments by the amounts of those payments. The representative of the Crown expressed his dissatisfaction with that decision as being erroneous in point of law, but did not demand a case to be stated for the opinion of the High Court.

5. For each of the years 1918–19 to 1927–28 inclusive the committee claimed similar deductions from the gross income of the estate in making his returns of the patient's income for the purposes of super tax, and these deductions were allowed by the Assessing Commissioners in making the assessments to super tax for those years.

6. In making his return of the patient's income for the purpose of super tax for the year ending April 5, 1929, the committee claimed that the following sums did not form part of the patient's income for the purposes of super tax, and ought to be allowed as deductions from the gross income of the estate :—

Lunacy percentage	136*l.*
Committee's remuneration . . .	50*l.*
Committee's guarantee premium . . .	18*l.*
Law costs	28*l.*
Total	232*l.*

In making the assessment under appeal, the Assessing Commissioners disallowed the whole of the deductions, upon the ground that they were payments made out of the income after it had become the income of the patient.

7. At the hearing of the appeal the claim for a deduction in respect of law costs was not pursued, but in regard to the other payments claimed as deductions it was contended on behalf of the committee :—

(*a*) That such payments did not form part of the income of the patient for purposes of super tax.

(*b*) That the case of the *Committee of A. B.* v. *Simpson* (1), which dealt with the question of the liability of the committee, as the person in control of the fund and receiving the income, to assessment to income tax, was not conclusive as to the computation of the patient's income for purposes of super tax.

(*c*) That the matter was res judicata, as the same question between the same parties (so far as regards the claim to deduct the lunacy percentage and the committee's remuneration) had already been finally determined by the Special Commissioners on the appellant's previous appeal.

8. It was contended on behalf of the Crown (inter alia) :—

(*a*) That the case was concluded by the decision in the case of the *Committee of A. B.* v. *Simpson.* (1)

(*b*) That the payments claimed as deductions were payments made out of the patient's income after it had become his income, and that they were not admissible as deductions in computing his income for the purposes of super tax.

(*c*) That the previous decision of the Special Commissioners only applied to the particular years to which the appeals then before them related, and that in determining the appeal now before them they were bound to follow the direction given by the High Court in a subsequent case, which had shown that their decision on the appellant's earlier appeal had been wrong in law.

9. We, the Commissioners, who heard the appeal, gave our decision in the following terms :—

" Although the question actually decided in the case of the *Committee of A. B.* v. *Simpson* (1) was a different one, we consider, in view of the language used in the judgment in that case, that if we were dealing with the present case de novo we should be bound to hold that both the lunacy percentage and the committee's remuneration were expenses made out of the lunatic's income after it has become his income, and not payments by which his income was diminished, and that they could not be deducted in computing his income for the purposes of super tax.

(1) 14 Tax Cas. 29.

"But the point is taken that the matter is res judicata, as the same question was raised in the case of the same appellant on appeal before the Special Commissioners against assessments for the years 1914–15 to 1917–18 inclusive in October, 1918, when it was decided in the appellant's favour, and it was held that the lunacy percentage and the committee's remuneration paid for the years then under review did not form part of the appellant's income. Having regard to the decisions in the cases of *Hoystead* v. *Commissioner of Taxation* (1) and *Aylmer* v. *Mahaffy* (2), we feel that we have no alternative but to admit this plea, and to allow the appeal as regards the lunacy percentage and the committee's remuneration.

"The claim for the guarantee premium and law costs is not covered by the previous decision, and we hold that these payments are not admissible deductions in computing the appellant's income for super tax.

"We accordingly reduced the assessment by the amount of the lunacy percentage and the committee's remuneration to the sum of 4699*l.*"

On an appeal by the Crown, Rowlatt J. said he had come to the conclusion that he had not authority to go into the matter, having regard to the decision of the Court of Appeal in Northern Ireland in *Aylmer* v. *Mahaffy*. (2) It was suggested that that case was distinguishable, because the decision, which was held to operate as res judicata, was a decision not of the Commissioners but of the Recorder of Belfast. It was decided by a Recorder under the special machinery applicable to Ireland under s. 196, sub-s. 1, of the Income Tax Act, 1918. The section really provided for a rehearing of the decision of the Special Commissioners with exactly the same powers before a Recorder, so that no different quality attached to his acts from that attaching to those of the Special Commissioners. He must, therefore, follow the decision of the Court of Appeal of Northern Ireland, as that Court did not appear to have relied upon any differentiation arising from the circumstance of the decision being that of the Recorder and not of the Special Commissioners. He must therefore hold, following the decision in that case, that the matter was res judicata.

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(1) [1926] A. C. 155.

(2) 10 Tax Cas. 594.

The Crown appealed. The appeal was heard on January 11, 12, 13 and 14, 1932, and judgment given on February 8, 1932.

Sir William Jowitt A.-G. and *Reginald Hills* for the Crown. There is no reason why, because part of the lunatic's income has to be used in paying the lunacy percentage of 136*l.* on the estate and the remuneration allowed to the committee, the sums so expended should not be included in his income for super tax purposes. The mere fact that a person has to utilize his income in a particular way does not make it cease to be his income. That was the view of the Special Commissioners, which receives support from the decision as to income tax in *Committee of A. B.* v. *Simpson* (1), and they were only prevented from so deciding by thinking that the question was res judicata. In this they were wrong. The decision of the Special Commissioners that, in assessing the tax for a particular year, these payments could be deducted from the lunatic's income, does not create an estoppel which prevents the question being considered anew in respect of another year's income. It is contended: (1.) that the tax in one year is a different tax from that in a subsequent year, so that there cannot be a res judicata except for the year for which the matter is decided; and (2.) that the Special Commissioners being a merely administrative body their decision cannot operate as a res judicata.

The limitations in regard to the doctrine of estoppel by res judicata are made clear in *Reg.* v. *Hutchings* (2); *North Eastern Ry. Co.* v. *Dalton Overseers* (3); and *Wakefield Corporation* v. *Cooke.* (4) When the proceedings took place before the Special Commissioners on the preceding occasion, all they had to decide was the amount of the tax for the year. The decision as to the lunacy percentage being merely incidental cannot operate as an estoppel. The machinery of the Income Tax Act, 1918, is that the assessors appointed under the Act issue notices under ss. 98 and 99, requiring delivery of the statement to be made by every person chargeable under s. 100. Sect. 101 provides for the delivery of a statement on behalf of any incapacitated person, and that applies to this case, and s. 107 imposes a penalty for not delivering a statement. Assessments are then made under ss. 108 to 113. Then by s. 120 the General Commissioners take into consideration assessments under Schs. A, B and E and sign them on being satisfied that the full tax is charged. Notices are given under s. 134 that this has been done and fixing a time for appeal under s. 136. Sect. 137 provides for the procedure on appeals. An appeal is not a lis in the ordinary sense: see s. 144. The General Commissioners who have signed the assessments themselves hear appeals. Further, s. 125 gives power to make additional assessments, and s. 133, sub-s. 3, is of importance as showing the limited effect of the Commissioners' decision. By s. 7, sub-s. 6, all these provisions are made applicable to super tax with a substitution of the Special Commissioners for the surveyor. It is submitted that whatever the position may be when the matter reaches the Court there is no lis when the proceedings stop at the Commissioners, who are merely a statutory body carrying out their duties. Finality as to what has been done in the particular year does not depend on the doctrine of estoppel but on the provisions of the Act: s. 133, sub-s. 3. This case really falls within the principle of *Inland Revenue Commissioners* v. *Brooks* (1), where it was held that for the purposes of assessment to super tax the sum at which the taxpayer had been assessed to income tax under Sch. D for the preceding year was not conclusive and binding on the Special Commissioners, and that the taxpayer might prove what was in fact his income in that preceding year. It was there held that there was no estoppel or res judicata. Each Finance Act imposes a new tax, and it would be extraordinary

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(1) 14 Tax Cas. 29.

(2) (1881) 6 Q. B. D. 300, 304, 305.

(3) [1898] 2 Q. B. 66, 73.

(4) [1903] 1 K. B. 417; affirmed by H. L. [1904] A. C. 31.

(1) [1915] A. C. 478.

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if the Commissioners were precluded by their decision in a previous year from determining the amount of tax de novo. Rowlatt J. held himself bound by *Aylmer* v. *Mahaffy* (1), but in that case it was the profits of the self-same year that were being litigated over again, although it was for the purpose of ascertaining the three years' average for another year. In any case it is contended that that decision was wrong and ought not to be followed. The present case comes within the principle of *Broken Hill Proprietary Co.* v. *Broken Hill Municipal Council* (2), where it was held that the decision of the Court as to a valuation and liability to tax in a previous year did not make the matter res judicata in regard to the valuation and liability for another year. *Hoystead* v. *Commissioner of Taxation* (3) is difficult to reconcile with the decision in the *Broken Hill* case (2), unless it can be said that the decision creating the estoppel was really dealing with the status of an individual, just as in *Wakefield Corporation* v. *Cooke* (4) the decision creating an estoppel was a decision as to the status of a street. In any case it would be wrong to import the doctrine of res judicata into a case where a statutory body has to consider a matter every year under a fresh Act. The Income Tax Act, 1918, contemplates a fresh adjudication each year, and all that the Commissioners determine is the amount of the tax for the particular year.

Latter K.C. and *Cyril King* for the respondent. The Court is not strictly bound by the decision in *Aylmer* v. *Mahaffy* (1), but that decision was right and should be followed. The position of the Recorder there was identical with that of the Commissioners here: compare s. 148, sub-s. 2, and s. 196, sub-s. 2, of the Act of 1918. The latter sub-section clothes the Recorder with the same powers as the Special Commissioners.

[LORD HANWORTH M.R. The Commissioners are not a Court of competent jurisdiction.]

It is sufficient to say that they are a tribunal which is competent. The plea of res judicata applies to everything

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(1) 10 Tax Cas. 594.
(2) [1926] A. C. 94.
(3) [1926] A. C. 155.
(4) [1904] A. C. 31.

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which "might have been brought forward as part of the subject in contest": *Hoystead* v. *Commissioner of Taxation.* (1) "It is not necessary that the point on which it is sought to estop should have been the only one in issue on the previous occasion": 2 Sm. L. C., 12th ed., pp. 789, 790.

Here the question whether the lunacy percentage and the committee's remuneration could be deducted from the income for purposes of taxation was one the Commissioners had necessarily to decide, and they are a tribunal quasi of record. This case is very different from *Reg.* v. *Hutchings* (2), where the justices took on themselves a jurisdiction which they did not possess in deciding that the street in question was a highway repairable by the inhabitants at large: see per Lord Halsbury L.C. in *Wakefield Corporation* v. *Cooke.* (3) Here the Special Commissioners had full jurisdiction to determine whether the deductions claimed could be made: see *Priestman* v. *Thomas.* (4)

It is said, however, that the principle of res judicata cannot apply in assessing the tax for a different year. But if the right to deduction has been determined for one year, it must apply to any other year. It is true that the tax is paid by a new Finance Act each year, but the deductions authorized remain the same and are fundamental to the decision given, as in *Hoystead* v. *Commissioner of Taxation.* (5) *Broken Hill Proprietary Co.* v. *Broken Hill Municipal Council* (6) related merely to the mode of ascertaining value and is distinguishable. This case falls rather within the principle of *Peareth* v. *Marriott* (7): see also *Humphries* v. *Humphries.* (8) Estoppels quasi of record are dealt with in 2 Sm. L. C., 12th ed., pp. 799–813, and it is pointed out (p. 811) that the sentence of a college visitor depriving or expelling is conclusive, and *Philips* v. *Bury* (9) is referred to, where Lord Holt's dissenting judgment was afterwards upheld in error. Lord Holt laid it down that the question

(1) [1926] A. C. 170.
(2) 6 Q. B. D. 300.
(3) [1904] A. C. 31, 34.
(4) (1884) 9 P. D. 70, 210.
(5) [1926] A. C. 155.
(6) [1926] A. C. 94.
(7) (1882) 22 Ch. D. 182.
(8) [1910] 2 K. B. 531.
(9) (1694) 1 Ld. Raym. 5.

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whether there is an estoppel does not depend on whether the decision is that of a Court, but on whether there was jurisdiction to decide the question. If a matter is decided by some one with jurisdiction, the principle applies that nobody is to be vexed twice on the same matter: see *Newall* v. *Elliot.* (1) Here the Commissioners are a body entrusted by statute with the determination of the whole question of what tax is payable, and that necessarily involved in this case a decision as to the right to make the deductions in question. Their previous decision therefore sets up an estoppel. The position of the Commissioners was made clear in *T. Haythornthwaite & Sons, Ld.* v. *Kelly.* (2) The process by which an appeal comes before the Commissioners shows that they are a judicial tribunal who have seisin of the whole matter, and whose decision is final subject to the provision for stating a case on matters of law: s. 133, sub-s. 2, and s. 148, sub-s. 2. They are a body with a judicial duty: *Reg.* v. *Special Commissioners of Income Tax* (3), and they, therefore, have all the requisites of a body whose decision will create an estoppel between the same parties on a point already decided. *Inland Revenue Commissioners* v. *Brooks* (4) is distinguishable for the reasons stated in *Aylmer* v. *Mahaffy.* (5) The decision in *Brooks*' case (4) really depended on the provision in s. 66, sub-s. 2, of the Finance (1909–10) Act, 1910, for a new estimate of the total income: see per Lord Sumner in that case. (6) Reliance has been placed on s. 133, sub-s. 3, of the Act of 1918, but it affords no ground for holding that there can be no estoppel outside the particular year.

Lastly, on the merits it is contended that *Committee of A. B.* v. *Simpson* (7) does not apply to a case relating to super tax. Distinct questions arise: *Inland Revenue Commissioners* v. *Countess of Longford* (8); see also *Singer* v. *Williams.* (9) The committee of the lunatic is assessable to

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(1) (1863) 1 H. & C. 797.
(2) (1927) 11 Tax Cas. 657, 667.
(3) (1894) 3 Tax Cas. 289.
(4) [1915] A. C. 478.
(5) 10 Tax Cas. 594, 604.
(6) [1915] A. C. 495.
(7) 14 Tax Cas. 29.
(8) [1928] A. C. 252.
(9) [1921] 1 A. C. 41.

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income tax as the person in receipt of the income, but for the purpose of super tax it is the lunatic's income which has to be taken into account and nothing else; and in determining that, allowance is made under s. 27 of the Income Tax Act, 1918, for annual payments reserved or charged out of the income. It must follow that if there is an annual payment made before the taxpayer is entitled to anything, that is a payment which never comes into the income at all and must be allowed as a deduction: compare *Murray* v. *Inland Revenue Commissioners* (1) and *Macfarlane* v. *Inland Revenue Commissioners.* (2)

[They also referred to *Special Commissioners* v. *Pemsel* (3); *Great Western Ry. Co.* v. *Bater* (4); *Whitney* v. *Inland Revenue Commissioners* (5); and *Rex* v. *Aldrington Commissioners.* (6)]

Reginald Hills in reply. On the question of res judicata the contention for the Crown is that both the subject and the Crown have everything open to them each year. The Special Commissioners can inquire into all matters relevant for the purpose of their ultimate decision, but no estoppel can arise in respect of these preliminary matters. The true test is laid down in *Barrs* v. *Jackson.* (7) Further, the Commissioners' decision is only binding as regards liability for the particular year. The argument on behalf of the respondent has been based very largely on *Hoystead's* case (8), in which some of the reasoning read out of its context needs qualification in the light of the Income Tax Act, 1918. In cases before the Commissioners the question of liability to some tax in principle is not as a rule in dispute. Lord Shaw was going too far in *Hoystead's* case (9) in saying that the principle of estoppel applies to all matters that could have been raised by the parties. Is there to be an estoppel on any point that is admitted?

[GREER L.J. I should feel difficulty if the Special Commissioners was a Court of competent jurisdiction in saying that there was not here an estoppel.]

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(1) (1926) 11 Tax Cas. 133.
(2) (1929) 14 Tax Cas. 532.
(3) [1891] A. C. 531, 573.
(4) [1922] 2 A. C. 1.
(5) [1924] 2 K. B. 602.
(6) (1916) 85 L. J. (K. B.) 1753.
(7) (1842) 1 Y. & C. C. C. 585.
(8) [1926] A. C. 155.
(9) [1926] A. C. 170.

In deciding whether there is an estoppel, it is necessary to see what was the proper purpose and object of the judgment pronounced. Further, there is the widest possible distinction between such a statutory body as this and the Court. This is a body which has power to decide on the assessment for the one year only, and even in that case an additional assessment is permissible in the circumstances mentioned in s. 125 of the Act of 1918: see *Anderton & Halstead, Ld.* v. *Birrell* (1). *Reg.* v. *Hutchings* (2) is a stronger case than this, for it related to a decision of justices, who are a Court. It shows that not all matters necessary for a decision create an estoppel: see also *Reg.* v. *Ollis.* (3) Cases such as *Humphries* v. *Humphries* (4) have no application to the decision of a tribunal such as the Commissioners. They are the tribunal to fix an assessment and that is all. The fact that they have power to increase an assessment shows how different their position is from that of a Court. The *Broken Hill* case (5) is directly in favour of the Crown's contention here, and *Brooks*' case (6) is also of great assistance: see also *Attorney-General for Trinidad* v. *Eriché.* (7) The whole basis of the decision in *Aylmer* v. *Mahaffy* (8) is wrong.

On the merits it is impossible to hold either that the percentage payable in lunacy or the committee's remuneration were payments made before his income reached the lunatic; nor are they annual payments "reserved or charged" on his income: *Earl Howe* v. *Inland Revenue Commissioners.* (9) *Mersey Docks and Harbour Board* v. *Lucas* (10) is a far stronger case than the present: see also *Perkins' Executor* v. *Inland Revenue Commissioners.* (11)

Cur. adv. vult.

Feb. 8. LORD HANWORTH M.R. This is an appeal from a judgment of Rowlatt J. given on March 13, 1931, dismissing an appeal from a decision of the Commissioners for the Special Purposes of the Income Tax Acts dated July 24, 1929. Rowlatt J. felt in duty bound to follow the decision of *Aylmer* v. *Mahaffy* (1) decided in the Court of Appeal of Northern Ireland, wherein a previous decision of the Recorder of Belfast upon a point which arose in reference to an assessment to income tax upon one Mahaffy for the financial year 1921–22 was held to operate as res judicata in reference to a similar claim to make a deduction from income assessed to tax in the financial year 1922–23.

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(1) [1932] 1 K. B. 271.
(2) 6 Q. B. D. 300.
(3) [1900] 2 Q. B. 758, 770.
(4) [1910] 2 K. B. 531.
(5) [1926] A. C. 94.
(6) [1915] A. C. 478.
(7) [1893] A. C. 518.
(8) 10 Tax Cas. 594.
(9) (1919) 7 Tax Cas. 289.
(10) (1883) 8 App. Cas. 891.
(11) (1928) 13 Tax Cas. 851.

The facts relevant to the subject-matter under appeal are as follows :—

The respondent to the appeal is the committee of one D. G. M., to whom the custody as well as the disposition and receipt of the estate of the patient was committed by an Order in Lunacy dated November 25, 1913, and a fee of 50*l*. per annum has been allowed to him for so acting.

By s. 148 of the Lunacy Act, 1890, it is enacted that "The Lord Chancellor, with the concurrence of the Treasury, may make rules fixing the percentage and fees payable in proceedings relating to lunatics and their estates, and regulating the mode in which the same are to be ascertained and paid ;" and by a rule made thereunder a percentage at the rate of 4 per cent. per annum on the clear annual income of a lunatic was duly fixed by the Lord Chancellor in 1892.

On October 21, 1918, the respondent appealed to the Special Commissioners against an assessment to super tax made upon him as committee of the patient's estate for the financial years 1914–15, 1915–16, 1916–17 and 1917–18 on the ground that the committee's remuneration and the lunacy percentage paid for the years material to those assessments did not form part of the patient's income for the purposes of super tax, and ought to be allowed as deductions from the gross income of the estate before the patient's income was computed for the purposes of super tax. No question was or is raised as to the form of the assessment, or as to the parties to this appeal, as both the appellant and the respondent have accepted the position thus stated and have not required the assessment to be made upon the patient and dealt with by the committee under s. 101 of the Act.

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(1) 10 Tax Cas. 594.

The Commissioners who heard the appeal accepted the contention raised on behalf of the committee and reduced the assessment by the amount of those payments. Although the representative of the Crown expressed his dissatisfaction with the decision as erroneous in point of law, he did not demand a case to be stated for the opinion of the High Court. After that decision had been reached, similar deductions from gross income of the estate were claimed by the respondent for each of the years 1918–19 to 1927–28 in respect of his return for assessment to super tax, and those claims were allowed by the Assessing Commissioners in the assessments of each of those years.

A claim for similar deductions was made for the purpose of super tax for the year ending April 5, 1929, but the Assessing Commissioners disallowed them on the ground that they were payments made out of the income after it had become the income of the patient and were to be deemed to be appropriations of his own disposable income.

This determination of the Assessing Commissioners was in accordance with a decision by Rowlatt J. in the case of *Committee of A. B.* v. *Simpson* (1), a case which was decided by him on a claim for a deduction from an assessment to income tax.

The respondent appealed to the Special Commissioners on the ground (1.) that the decision in *Simpson's* case (1) was not conclusive as to the computation of the patient's income for purposes of super tax; (2.) that the matter was res judicata, as it had already been determined by the Special Commissioners upon the appeal raised before them in October, 1918.

The Special Commissioners came to the conclusion that although the question decided in *Simpson's* case (1) was upon a claim for a deduction in the matter of income tax,

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(1) 14 Tax Cas. 29.

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yet that if they had been dealing with the matter de novo they would have held that the payments in respect of which the deductions are now claimed " were expenses made out of the lunatic's income after it has become his income, and not payments by which his income was diminished, and that they could not be deducted in computing his income for the purposes of super tax."

But upon the second point taken, they state that " having regard to the decisions in the cases of *Hoystead* v. *Commissioner of Taxation* (1) and *Aylmer* v. *Mahaffy* (2), we feel that we have no alternative but to admit this plea and to allow the appeal as regards the lunacy percentage and the committee's remuneration."

When that decision came before Rowlatt J. he felt bound to follow the case of *Mahaffy.* (2) His words are: " I say with some disappointment I think I am precluded from going into this case and expressing my own view." Hence this appeal.

It therefore raises the two questions tabulated before the Commissioners, and I proceed to deal with the first point: Does the principle established in *Simpson's* case (3) apply to the present assessment, which is in relation to super tax?

Super tax is charged by s. 4 of the Income Tax Act, 1918: and by s. 5 the income is to be estimated at the total income from all sources for the previous year with certain allowable deductions. Those details are not relevant upon this point, for what is argued is that the money otherwise payable to, and receivable by the patient, was reduced by a statutory exaction from it, so that the reduced amount was his income and not the undiminished and larger sum which would have reached him but for the overriding force of the Lunacy Act and Rules. For the purpose of this argument no distinction can in my opinion be drawn between the fee or remuneration paid to the committee and the percentage which is devoted to the cost of the administration of lunatics' estates. Both are exigible under the Lunacy Act and the Rules made under it.

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(1) [1926] A. C. 155.

(2) 10 Tax Cas. 594.

(3) 14 Tax Cas. 29.

It is to be noted that by the Lunacy Rule 133 "The Masters shall certify the amount of percentage payable in each case, and the person who is to pay the same, and the time within which the same is to be paid, and such person shall pay the same out of the first money coming to his hands on account of income." So far, therefore, as the method goes, the money first passes to the committee, and it is out of money received by him as income of the patient that he is to satisfy the percentage required to be paid. In *Simpson's* case (1) Rowlatt J. held that this payment was "an expense like any other expense of a person, sane or insane; an expense compulsory or not, it does not matter; but an expense made after income is received and has borne tax out of the money which is left in the hands of the recipient."

It has long ago been held that an appropriation of profits made by a statute does not render the portion thus deflected any less a part of the profits subjected to tax: see *Mersey Docks and Harbour Board* v. *Lucas.* (2)

Two Scottish cases were cited to the Court: *Murray* v. *Inland Revenue Commissioners* (3) and *Macfarlane* v. *Inland Revenue Commissioners.* (4) Both these cases were decisions upon the terms of particular trusts as to the sum to which the beneficiaries were entitled. The question that arose was: Was the sum payable to the beneficiaries that which remained after the payment of the expenses of the management of the trust which were to be discharged in priority to their receipt of any payment, or were the expenses of management to be treated as taken out of the sum to which they had an absolute interest? In both cases it was held that under the terms of the trusts the interest of the beneficiaries was confined to the net sum after payment of the expenses. These cases do not serve to contradict the principles above stated—more particularly having regard to the terms of r. 133 above quoted.

The Lunacy Act provides for the appropriation or application of the patient's income—not the alienation of it; and see a decision of Rowlatt J.: *Perkins' Executor* v. *Inland Revenue Commissioners* (1), which illustrates this distinction. I come therefore to the conclusion that the Commissioners were right in their decision upon this point, and that the deduction claimed ought not to be allowed in the case of super tax.

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(1) 14 Tax Cas. 29.

(2) 8 App. Cas. 891.

(3) 11 Tax Cas. 133.

(4) 14 Tax Cas. 532.

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I turn therefore to the second and very difficult point: Is the claim for this deduction res judicata by the decision of the Special Commissioners in October, 1918?

There is a subsidiary point which also arises: if the decision in October, 1918, was the decision of a lis between the parties, for how long is it effective? Can it create an estoppel for all time, or only in relation to the assessment of the particular year, because super tax is a tax annually imposed and charged and assessed for the year of charge only?

The appeal in *Aylmer* v. *Mahaffy* (2) was decided in Northern Ireland in May, 1925. *Hoystead* v. *Commissioner of Taxation* (3) was an appeal from Australia and was decided in December of that year.

Part IX. of the Income Tax Act, 1918, contains special provisions applicable to Ireland. By s. 195 all appeals against assessments are to be heard and determined by the Special Commissioners, and their determination on any appeal is to be final and conclusive, unless the person assessed requires (*a*) that his appeal shall be reheard as thereinafter provided, or (*b*) unless under s. 196 a case is required to be stated for the opinion of the High Court. If the latter option is exercised, then the special case comes before the High Court, equally in Ireland as in England, as designated in s. 235, and by s. 149 the High Court has the powers specified therein, and a further appeal lies through the Courts to the House of Lords. This procedure only enables an appeal to be dealt with on a point of law.

But if the earlier option is exercised then the appeal of the assessed person, which includes questions of fact as well as of law, is reheard by the Recorder or the county court judge, as the case may be, having jurisdiction in the place where the assessment was made, and the determination of the matter by the Recorder or county court judge is final and conclusive. There is no step by way of appeal ultra.

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(1) 13 Tax Cas. 851.

(2) 10 Tax Cas. 594.

(3) [1926] A. C. 155.

Mahaffy's appeal as to the assessment upon him for 1921–22 was determined by the Recorder of Belfast irrevocably and irremediably. The appeal from the assessment made upon him in 1922–23 followed the other procedure by case stated, and so came on the point of law only before the Court of Appeal of Northern Ireland. It is to to be noticed that the decision of the High Court was that the Commissioners ought to have acted upon their view that the claim for deduction made was not permissible. Incidentally Henry C.J. comments upon the fact that the appeal before the Court related only to the later year: 1922–23, that is to say, was from a fresh and independent assessment for another year. The Court of Appeal, however, allowed the appeal to their Court and treated the decision of the Recorder as to the previous year as an estoppel, the decision having been given on a definite issue between two opposing parties by a tribunal competent to decide between them, and found authority for supporting that judgment in the case, among others, of *Inland Revenue Commissioners* v. *Brooks* (1), to which I must refer later. One comment arises from a consideration of the judgments delivered in the Court of Appeal of Northern Ireland on a point that may have influenced their decision, and that is that they deprecated the "jockeying for Courts" which had taken place—the one party being anxious to take the case once more before the Recorder, the other being anxious to avoid that tribunal and to have the cases decided afresh as on a point of law. Moore L.J. said that it was a mixed question of law and fact, and was so determined by the Recorder.

In *Hoystead* v. *Commissioner of Taxation* (2) it was decided by the Privy Council that a previous decision of the Full Court of Australia upon a point fundamental to their decision created an estoppel on the same question which arose in a

(1) [1915] A. C. 478.

(2) [1926] A. C. 155.

later year as between the same subjects and the taxing authorities. The earlier decision was as to the status of six daughters under their father's will—were they owners of the original shares under the will? If they were original owners, were they entitled to a separate and individual deduction as against the charging authority? It was decided by the Full Court in favour of the daughters, and their status under the will was thus once and for all determined. It is not difficult to follow this decision or to accept the view that the earlier decision created an estoppel.

The case of *Broken Hill Proprietary Co.* v. *Broken Hill Municipal Council* (1) was decided on November 10, 1925, in between the above two decisions. It was there held that a previous decision of the High Court of Australia, which related to a valuation and a liability to tax in a previous year, did not provide an estoppel as res judicata. The decision of the Board affirmed that in the year for which the decision was reached, it could not be disputed, but the judgment went on (2): "The present case relates to a new question—namely, the valuation for a different year and the liability for that year. It is not eadem quaestio, and therefore the principle of res judicata cannot apply."

The observation of Henry C.J. referred to above is in accord with this view of the Privy Council. It is thus important to examine the nature of the decision of the Special Commissioners upon an assessment to tax charged upon a subject.

The conditions that must be fulfilled if an estoppel arising upon res judicata is to be effective are not in doubt. Lord Selborne states them in his judgment in *Reg.* v. *Hutchings* (3), quoting from the judgment of De Grey C.J. in the *Duchess of Kingston's Case.* (4)

There must be a lis inter partes in which the point relied upon for establishing the estoppel was not merely incidentally, or collaterally, discussed and litigated, but was fundamental to the conclusion reached by the Court. The Court must be one of competent jurisdiction that has seisin of the case for the purpose of reaching a final decision inter partes, though it may be a private tribunal such as an arbitrator, whose forum is a domestic one constituted by the parties themselves.

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(1) [1926] A. C. 94.

(2) Ibid. 100.

(3) 6 Q. B. D. 300, 304.

(4) (1776) 2 Sm. L. C. (7th ed.), 767.

What, then, was the function and power of the Special Commissioners in October, 1918 ?

The method of estimating the super tax of an individual is analogous to that whereby the income of a person is estimated for income tax charged upon him in respect of it.

By s. 7, sub-s. 6, of the Act of 1918, all the provisions of the Income Tax Act, relating to persons who are to be chargeable with income tax, and to income tax assessments, and to appeals against those assessments, shall so far as they are applicable apply to the charge and assessment of super tax ; and the Special Commissioners shall "for the purpose of assessment, have any powers of a surveyor." Some of the most important of his powers are to be found in s. 121. He is enabled to examine the statements of profits or gains rendered by the person charged under Sch. D ; if he makes no objection the assessment is made ; if he is dissatisfied with the decision of the Additional Commissioners, he can appeal to the General Commissioners ; he can take objection to a statement rendered and put the matter in train to be decided, and upon an appeal for the purpose of the representation of the Crown on any appeal before the Special Commissioners, "any person nominated in that behalf by the Commissioners of Inland Revenue shall have the same powers at, and upon the determination of, the appeal as a surveyor has at, and upon the determination of, any appeal relating to income tax." (1)

Those powers are to be found in ss. 137 to 139, and when the appeal against an assessment under Sch. D, or an objection by a surveyor, has been heard by the Special Commissioners, then by s. 148 their determination is final and conclusive, though thereafter the matter may come before the High Court upon a case stated under s. 149.

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(1) Sect. 7, sub-s. 6.

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It is the amount of the assessment to be made upon the facts of the case before them that is determined by them. By s. 149, sub-s. 2, "The High Court shall hear and determine any question or questions of law arising on the case." The High Court may reverse, affirm, or amend the determination in respect of which the case has been stated, or remit the matter to the Commissioners with the opinion of the Court thereon. It is difficult to attribute to such a determination of an assessment in amount the decision of a lis inter partes. The observations of Lord Herschell in *Boulter* v. *Kent Justices* (1) seem applicable to such a proceeding, although the decision related to the question of the refusal of justices to renew a licence. He says (2): "There is, in truth, no lis, no controversy inter partes, and no decision in favour of one of them and against the other, unless, indeed, the entire public are regarded as the other party." There is no interest in the surveyor, except to bring before the Court all facts relevant to the assessment. The decision does not enure in his favour unless he is to be treated as representing the taxpayers at large, exclusive of the one upon whom the assessment in question is made.

The view that I am expressing is in accord with the decision in *Inland Revenue Commissioners* v. *Brooks* (3), and the fact that the effect of it was set aside by s. 5, sub-s. 2, of the Act of 1918, does not impair the principle on which the case was decided. Lord Parker said (4) that he did not dispute the general principles of law governing estoppels; "but it seems to me that where there is a statutory provision requiring an estimate to be made for a statutory purpose and by a statutory authority, the principle of estoppel cannot be invoked to render the provision nugatory in cases where such principle might otherwise have applied."

In this view it is unnecessary to discuss the difficult question that arises upon estoppel as illustrated by *Hoystead's* case (5), and the cases dealt with in the judgment

(1) [1897] A. C. 556.
(2) Ibid. 569.
(3) [1915] A. C. 478.
(4) Ibid. 491.
(5) [1926] A. C. 155.

of Lord Shaw : *Reg.* v. *Hutchings* (1) and *Wakefield Corporation* v. *Cooke.* (2)

There is, however, the subsidiary point which I have referred to above, and upon which I desire to add some observations.

In the course of the argument of the case, our attention was directed to the several sections under which the tax is imposed for the year at the rate fixed by the Finance Act passed in each year—s. 1 ; the assessment and charge to tax is to be made for a year from April 6 in one year to April 5 in the following year—s. 2 ; and the year of assessment is the year for which the grant of the tax has been made by the Act imposing it—s. 237. The assessors are appointed for a year—s. 76, sub-s. 3, and claims for exemption and abatement are to be made by him who makes the claim by delivery to the assessors of all particulars—a duty which recurs in every year of charge.

It seems difficult to attribute to an assessment thus made such a permanence as will provide an estoppel by res judicata in all future years by reason of a matter taken into account, or not taken into account, in a previous assessment for a year. The assessment seems inherently to be of a passing nature.

The Special Commissioners are empowered under s. 7, sub-s. 7, to amend any assessment made by them thereunder, or to make an assessment or an additional assessment during any time within the year of assessment, or within six—it used until 1923 to be three—years after the expiration thereof. The difficulty arising from the tax being annual, and for a year only, is at once emphasized and overcome by the special provisions of s. 210.

These provisions seem fully to justify the application of the observations made in the Australian appeal (3) to the present case, and the application of the principle in *Inland Revenue Commissioners* v. *Brooks.* (4)

I am, therefore, of opinion that the assessment is final and conclusive between the parties only in relation to the

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(1) 6 Q. B. D. 300.
(2) [1904] A. C. 31.
(3) [1926] A. C. 100.
(4) [1915] A. C. 478.

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assessment for the particular year for which it is made. No doubt a decision reached in one year would be a cogent factor in the determination of a similar point in a following year, but I cannot think that it is to be treated as an estoppel binding upon the same party for all years.

For these reasons I am of opinion that the appeal must be allowed, the reductions claimed disallowed and the assessment in full affirmed. There will be no costs in accordance with the arrangement made by the Attorney-General with the respondents.

GREER L.J. In this case the income of a lunatic has been assessed by the Special Commissioners upon the assumption that they were bound to treat the lunacy percentage payable out of the lunatic's income amounting to 136*l.*, and the committee's remuneration amounting to 50*l.*, making in all 186*l.*, as a deduction from the total of the moneys received by his committee before ascertaining the lunatic's income for tax purposes in respect of super tax for the year ending April 5, 1929, on the ground that the taxing authority is estopped from contending that the said sums are not deductions from income, but are sums paid on behalf of the lunatic out of his taxable income. The Commissioners, while expressing an opinion in favour of the Crown, did not give a decision on the question whether the said sums were rightly treated as proper deductions in ascertaining the lunatic's income, because they decided that the Attorney-General was estopped from inquiring into this matter by reason of the decision of Commissioners on a similar question in respect of the income of the lunatic for super tax purposes in the years 1918–19 to 1927–28.

The principal question arising for decision on this appeal is whether the taxing authority is so estopped. I have come to the conclusion that the taxing authority is not so estopped. Income tax and super tax are imposed by the legislature separately for each year of tax. Inasmuch as it is impossible to collect the tax unless there is some machinery to enable the authorities to ascertain what is the amount of the income on which the tax is to be paid, elaborate machinery is provided by the incorporation in the taxing statute of the tax management Act of 1918, as amended from time to time, to enable the income to be ascertained. There must be in each year through the means provided by the statute for assessment, ascertainment of the taxpayer's income for the purpose of Sch. D, which is the only one with which this appeal is concerned. The taxpayer has to make a return for assessment after receiving notice from the assessors. When the return is made the assessor is under a duty to examine the statement, and under s. 113, to deliver it to the Commissioners, who then make an assessment upon which the tax can be levied if there is no appeal. By s. 136 any person aggrieved may appeal in the case of income tax to the General Commissioners by giving twenty-one days' notice, and, in the case of super tax, to the Special Commissioners, and he must give notice of the grounds of his appeal. The Special Commissioners then determine upon the examination of the appellant, and any other evidence that is before them, and upon hearing his solicitor or counsel, what his assessment is to be for the year of tax with which the assessment is concerned, and they have power to increase the assessment. The Commissioners who hear the appeal in any one year may, of course, be different persons from those who heard an appeal in the previous year, but the assessors and the Commissioners have imposed upon them the duty of making the assessment in each year, and whether that assessment is made before or after an appeal, it is, in my judgment, the estimate of the Commissioners for the year in question, and the assessors in any subsequent year have to make their own estimate, and are not bound by the estimate made in previous years. I think the estimating authorities, even when an appeal is made to them, are not acting as judges deciding litigation between the subject and the Crown. They are merely in the position of valuers whose proceedings are regulated by statute to enable them to make an estimate of the income of the taxpayer for the particular year in question. The nature of the legislation for the imposition of taxes making it necessary that the statute should provide for some machinery whereby the taxable income is ascertained, that machinery is set going separately for each year of tax, and though the figure determined in one year is final for that year, it is not final for any other purpose. It is final not as a judgment inter partes but as the final estimate of the statutory estimating body. No lis comes into existence until there has been a final estimate of the income which determines the tax payable. There can be no lis until the rights and duties are ascertained and thereafter questioned by litigation. It would be unfortunate if we were compelled to arrive at any other result, because it might well be that in any one year the taxpayer might not think it worth while to challenge the decision of the Commissioners for that particular year, though it might in later years prove to be worth his while to contest their view. On the other hand, it is equally likely that there may be many cases in which the Crown would be quite prepared to make a concession in one year, whereas they might rightly conclude in subsequent years that it would not be in the interests of taxpayers generally that they should make such a concession. It is also worth noting that statutory allowances by way of deduction from tax are often varied by the Taxing Act of any particular year.

I think on principle that the Commissioners, even when they hear a case on appeal, are not giving a decision which can give rise to an estoppel. Further, I think the question is determined by the decision in *Inland Revenue Commissioners* v. *Brooks* (1) in the House of Lords: see especially the speech of Lord Loreburn (2), where he sets out the relevant facts of the case and the decision of the House of Lords. I do not think the decision of the Privy Council in the case of *Hoystead* v. *Commissioner of Taxation* (3) is an authority to the contrary, because in that case the decision which was treated as giving rise to an estoppel was a decision not of the Commissioners, but of the Australian High Court.

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(1) [1915] A. C. 478.

(2) [1915] A. C. 482.

(3) [1926] A. C. 155.

The views above expressed seem to me to render it unnecessary to enter into the question whether, if the decision of the Commissioners could be treated as a decision of a Court of record, it ought to be determined that the point whether the alleged deductions were rightly made was an essential part of the decision, or was only incidentally cognizable within the meaning of the case of *Reg.* v. *Hutchings.* (1) This is a question of some difficulty, but I think it better to reserve my views about it until it necessarily arises.

On the question of estoppel Rowlatt J. did not give any reasons of his own. He considered himself bound by the decision of the High Court of Northern Ireland in the case of *Aylmer* v. *Mahaffy.* (2) We are not bound by that case, and in my judgment it was wrongly decided. It was argued for the respondent, though not very strenuously, that the sums in question were proper deductions to be made from the total income of the lunatic in order to arrive at his net assessable income. In my judgment, this argument ought not to succeed. By reason of his status as a lunatic the taxpayer is compelled by law to have his affairs managed under the lunacy laws. The costs of such management consist of a percentage payable to a Government Department, and the sum of 50*l.* payable to the committee. These sums are, in my judgment, just as much payments out of income as similar payments would be in the case of an individual taxpayer who for his own convenience paid a bank or other agent a commission to look after his property and manage his affairs.

In my judgment the appeal should be allowed.

Romer L.J. In this case the Commissioners would have been prepared to accept the appellants' contention that the lunacy percentage and the committee's remuneration could not be deducted in computing the patient's income for the purposes of super tax, had they not come to the conclusion that the appellants were estopped from so contending by reason of the decision of the Special Commissioners in the year 1918. Rowlatt J. on appeal came to the same conclusion. The first question to be determined therefore is whether the appellants are so estopped. Now in the case of *Hoystead* v. *Commissioner of Taxation* (1) the principle of estoppel at common law was stated and, if I may respectfully say so, was in my opinion correctly stated by Lord Shaw (2) as follows: "If in any Court of competent jurisdiction a decision is reached, a party is estopped from questioning it in a new legal proceeding. But the principle also extends to any point, whether of assumption or admission, which was in substance the ratio of and fundamental to the decision." It is to be observed that the principle only applies to a decision of a Court of competent jurisdiction. That this is so has been recognized in at least two reported cases. In *Reg.* v. *Hutchings* (3) an urban authority had in the year 1874 taken proceedings before the justices in petty sessions for the purpose of recovering summarily from one Hutchings his quota of the expenses alleged by the authority to have been incurred by them under s. 150 of the Public Health Act, 1875, in executing certain works in and over a street on which Hutchings was a frontager. The section in terms only applies to streets that are not highways, and the justices dismissed the summons on the ground that the street in question was in fact a highway. In the year 1879 the urban authority took further summary proceedings against Hutchings under the same section for the purpose of recovering his quota of further expenses incurred by them in connection with the same street. It was held by the Court of Appeal that the authority was not estopped by the decision of the justices in 1874 from alleging that the street was not a highway. The reason, as I understand the judgment, was that the justices had no jurisdiction to decide the question whether the street was a highway or not, although they necessarily had to form an opinion upon the matter before they could make an order upon Hutchings for payment. Lord Selborne said (4): "We are not in this case called upon to determine how far, or under what conditions, an order of a court of summary jurisdiction may operate between the parties to it as an estoppel. Assuming that it may do so to some extent, and under some conditions, I conceive it to be clear that it cannot so operate . . . . as to any matter as to which that court had no authority to adjudicate directly and immediately between the parties." Such at any rate was the view of the case taken by Lord Davey in the House of Lords in *Wakefield Corporation* v. *Cooke.* (1) He said (2): "They," that is to say the justices, "had jurisdiction to decide whether a sum of money was due from a particular individual to the corporation, and for the purpose of determining that question it might be necessary for them incidentally to express an opinion upon the question of whether a road was a highway repairable by the inhabitants at large or not; but, supposing that to be so, that would not make an incidental determination of that kind res judicata in a subsequent proceeding in which that question came into prominence." In the *Wakefield Corporation* case (1) the court of summary jurisdiction did have power to adjudicate upon that question, so that their decision upon it became res judicata.

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(1) 6 Q. B. D. 300.

(2) 10 Tax Cas. 594.

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(1) [1926] A. C. 155.
(2) Ibid. 170.
(3) 6 Q. B. D. 300.
(4) Ibid. 304.

The principle applied in *Hutchings'* case (3) was also applied by the Privy Council in *Attorney-General for Trinidad* v. *Eriché.* (4) In rejecting the contention that certain proceedings taken before a stipendary magistrate and on appeal from him to the Supreme Court of Trinidad constituted res judicata on a question of title to lands, Lord Hobhouse, who delivered the judgment of the Board, said (5): "It is hardly necessary to refer at length to authorities for the elementary principle that in order to establish the plea of res judicata the judgment relied on must have been pronounced by a Court having concurrent or exclusive jurisdiction directly upon the point. In the *Duchess of Kingston's Case* (6), which is constantly referred to for the law on this subject, it is laid down that in order to establish the plea of res judicata the Court whose judgment is invoked must have had jurisdiction and have given judgment directly upon the matter in question; but that if the matter came collaterally into question in the first Court, or were only incidentally cognizable by it, or merely to be inferred by argument from the judgment, the judgment is not conclusive. In the present case the question of title is only incidentally cognizable by the magistrate, and by the Court sitting in appeal from him."

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(1) [1904] A. C. 31.
(2) Ibid. 38.
(3) 6 Q. B. D. 300.
(4) [1893] A. C. 518.
(5) [1893] A. C. 522, 523.
(6) 2 Sm. L. C. (7th ed.), 642; (13th ed.), 644.

In these circumstances the contention of the respondent to the present appeal that the appellants are estopped by the decision of the Commissioners in the year 1918 from alleging that the lunacy percentage and the committee's salary are not permissible deductions from the patient's income for the purposes of super tax for the year 1928–29 cannot, in any case, succeed if the Commissioners when deciding the proper amount of the patient's assessment to super tax for the years 1914–18 had no jurisdiction to adjudicate directly upon the question and as a substantive issue whether the sums in question could be deducted in other years. In my opinion they had no such jurisdiction. The duty of the Commissioners, as I read the provisions of the Income Tax Acts, is to form an estimate in each year of assessment of the amount of the income of the taxpayer on which the surtax imposed for that year is to be charged. For this purpose the taxpayer is required to make a return of his income from all sources as defined by s. 5 of the Income Tax Act, 1918. With this to guide them, the Special Commissioners have then to form their own estimate of the total income and to make an assessment accordingly. If the taxpayer is not content with such assessment he can bring the matter before the Special Commissioners by way of appeal. But the proceedings on the appeal are still merely directed towards ascertaining the income upon which the taxpayer is to be charged with surtax for the particular year of assessment, and the Special Commissioners may, if they think fit, increase the assessment made by them in the first instance. The appeal is merely another step taken by the

Commissioners, at the instance of the taxpayer, in the course of the discharge by them of their administrative duty of collecting the surtax. In estimating the total income of the taxpayer the Commissioners must necessarily form, and perhaps express, opinions upon various incidental questions of fact or law. But the only thing that the Commissioners have jurisdiction to decide directly and as a substantive matter is the amount of the taxpayer's income for the year in question. This being so, their decision upon any incidental question of fact or law, however necessary it may be for the purpose of ascertaining the income for the year of assessment, cannot, as it seems to me, be conclusive in reference to the ascertainment of the taxpayer's income for any subsequent year of assessment with which the Commissioners have nothing to do, and in respect of which a fresh estimate will have to be made when the time comes, and possibly by other Special Commissioners.

For these reasons I am of opinion that the decision of the Special Commissioners in the year 1918 does not estop the appellants from now raising the question whether the lunacy percentage and the committee's remuneration are proper deductions from the patient's income for the purpose of an assessment to super tax for the year 1928–29.

As to the question itself, it must in my opinion be answered in the negative for the reasons just given by the other members of the Court, to which reasons I cannot usefully add anything. I accordingly agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Waterhouse & Co.*

H. C. G.

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March 7.

BAILEY *v.* MARCHIONESS CURZON OF KEDLESTON.

[1931. B. 2856.]

SAME *v.* DUGGAN.

[1931. B. 2871.]

Practice—Contract to act as Companion—Contract with Parent in respect of Son—Action against Parent on Contract—Action against Son for Indemnity—Consolidation of Actions—Rules of Supreme Court, Order XLIX., *r.* 8; *Order* XVI., *rr.* 1, 4.

A lady, who was a widow, agreed with the plaintiff that he should act as companion to her son, a young man of full age, and exercise general supervision over him and over his expenditure in consideration of a certain salary, a certain allowance which was not to be unduly exceeded, and payment of the plaintiff's travelling and other, not being merely personal, expenses. The agreement was subject to one month's notice of termination. The plaintiff brought two actions, one against the lady for wrongful dismissal and other breaches of the contract, and the other against the young man for indemnity against liabilities incurred, and for repayment of disbursements made, by the plaintiff on his behalf:—

Held, that in view of the change in procedure effected by Order XVI., rr. 1 and 4, of the Rules of the Supreme Court, an order might properly be made under Order XLIX, r. 8, consolidating the two actions.

Lee v. *Arthur* (1908) 100 L. T. 61 declared to be no longer law.

APPEAL from an order of Acton J. reversing an order of Master Jelf, who ordered that two actions of *Bailey* v. *Marchioness Curzon of Kedleston* and *Bailey* v. *Duggan* should be consolidated.

In the first named action, Colonel Edward Alec Horsman Bailey, the plaintiff, in his statement of claim alleged that in January, 1929, it was agreed between the plaintiff and the defendant that the plaintiff should act as companion to the defendant's son by a former marriage, Alfred Leo Duggan, and should exercise a general supervision over him and over his expenditure and should see that he was maintained in a style of living suitable to his station in life and in accordance with the defendant's directions from time to time, upon the following amongst other terms:—

(*a*) That the defendant should pay to the plaintiff the sum of 250*l.* a month on account of expenses for the purpose of maintaining the said A. L. Duggan as aforesaid, and that the plaintiff should use his best endeavours to restrict the annual total of such expenses to a sum not unduly in excess of 3000*l.*;

(*b*) That the plaintiff should be entitled to one month's notice of termination of the agreement;

(*c*) That the plaintiff should be entitled during the period of the agreement to a remuneration of 2*l.* 2*s.* a day, payable monthly on the fifteenth day of each month;

(*d*) That the plaintiff should be entitled during the period of the agreement to free accommodation and to all travelling and living expenses save only personal needs such as clothes. It was further alleged that the defendant knew that it would be necessary for the plaintiff from time to time to incur liabilities in his own name and make payments out of his own money, and agreed to indemnify the plaintiff in respect of such liabilities and payments if the monthly payments of 250*l.* were insufficient to meet them; that subsequently in April, 1930, the one month's notice to terminate the agreement was altered to a six months' notice; but that on January 29, 1931, the defendant purported to terminate the agreement as from May 1, 1931, and from and after April 15, 1931, refused to pay the plaintiff the agreed remuneration or to furnish him with free accommodation or travelling or living expenses or to pay him 250*l.* a month for covering liabilities incurred and payments made or to indemnify him for the same. The plaintiff claimed 35*l.* 14*s.* arrears of remuneration and in addition damages for wrongful dismissal and other breaches of the agreement.

The defendant pleaded that by the agreement made in January, 1929, it was expressly provided that the income allowed should cover all A. L. Duggan's expenses and those of the plaintiff, and that the figure of 3000*l.* a year was to be kept to as nearly as possible; that 3000*l.* a year was ample for those expenses and that the plaintiff had no authority to incur liabilities or make payments out of his own money, but that it was his duty to keep the expenses within 3000*l.* a year. The defendant denied that any new agreement was made in April, 1930, varying the time within which notice to terminate the agreement might be given, but insisted that it was subject to a month's notice, that she had in fact given three months' notice, as she lawfully might, and that there was no wrongful dismissal. She admitted that 35*l.* 14*s.* was due to the plaintiff in respect of salary from April 15 to May 1, 1931, and brought that sum into Court.

The second action was brought by the said Col. E. A. H. Bailey, the plaintiff in the first action, against the said Alfred Leo Duggan, the son of the Marchioness Curzon of Kedleston. The statement of claim alleged that in January, 1929, an agreement had been made between the plaintiff and the defendant that the plaintiff should act as companion to the defendant and should exercise a general supervision over his expenditure and manage his affairs for him; that it was well known to the defendant that it would be necessary for the plaintiff on his behalf to incur liabilities and disburse money, and that it was an implied term of the agreement that the defendant should indemnify the plaintiff in respect of such liabilities and disbursements; that the plaintiff incurred liabilities and made disbursements, and in particular entered into a hire-purchase agreement to acquire a Daimler motor-car and allowed the defendant the use of a Buick car, the property of the plaintiff; that, relying on an authority given to him by the defendant to sell certain valuable horses, the plaintiff incurred further liabilities and made further disbursements; that in February or March, 1931, the defendant wrongfully revoked this authority and had failed to indemnify the plaintiff in respect of liabilities incurred by him on the defendant's behalf or to pay him anything in respect of the user of the Buick car. The plaintiff claimed damages for breach of contract and wrongful revocation of authority.

The defendant pleaded that at all material times the plaintiff was employed under an agreement of January 15, 1929, between the plaintiff and the defendant's mother, whereby the defendant's mother was to pay the plaintiff salary at the rate of 2*l.* 2*s.* a day, together with free accommodation and travelling and living expenses, and the plaintiff was to act as companion to the defendant and administer on his behalf an income of 3000*l.* a year allowed by the defendant's mother for travelling and all other expenses of the defendant and the plaintiff, that all acts done by the plaintiff for the defendant were done under that agreement and not otherwise; that the defendant never gave the alleged authority to sell the horses or to enter into the hire-purchase agreement for the Daimler car, and that he shared in the use of the Buick car on the invitation and as the guest of the plaintiff.

The writ in the first action was issued on June 24, and that in the second action on June 25, 1931. An order of directions was made on July 15, 1931, in the first action.

On February 12, 1932, on the application of the plaintiff in both actions, an order was made by Master Jelf under Order XLIX., r. 8, of the Rules of the Supreme Court (1) that the two actions should be consolidated. The defendants appealed to the judge in Chambers, and Acton J. rescinded the order of Master Jelf and gave leave to appeal.

The plaintiff appealed.

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(1) Rules of the Supreme Court, Order XLIX., r. 8: "Causes or matters pending in the same Division may be consolidated by order of the Court or a Judge in the manner in use immediately before November 1, 1875, in the Superior Courts of Common Law."

[By the Supreme Court of Judicature (Commencement) Act, 1874 (37 & 38 Vict. c. 83), s. 2, it was provided that the Supreme Court of Judicature Act, 1873, should, with certain immaterial exceptions, commence and come into operation on November 1, 1875. Until the passing of the Supreme Court of Judicature (Consolidation) Act, 1925, Order XLIX., r. 8, ended with the words "in use before the commencement of the principal Act"—i.e., the Judicature Act, 1873—"in the Superior Courts of Common Law." In 1926 the words "immediately before November 1, 1875," were substituted for "before the commencement of the principal Act."]

Order XVI., r. 1: "All persons may be joined in one action as plaintiffs, in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, where if such persons brought separate actions any common question of law or fact would arise; provided that, if upon the application of any defendant it shall appear that such joinder may embarrass or delay the trial of the action, the Court or a Judge may order separate trials, or make such other order as may be expedient. And judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment" . . . .

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BAILEY v. CURZON OF KEDLESTON (MARCHIONESS). SAME v. DUGGAN.

Van Oss for the appellant. The learned judge considered himself bound by the decision of this Court in *Lee* v. *Arthur.* (1) When that case was decided, the full effect of the amendment of Order XVI., r. 1, in October, 1896, had not been appreciated. Persons may now be joined as plaintiffs in one action, where if several actions were brought "any common question of law or fact would arise": *Thomas* v. *Moore* (2); *Payne* v. *British Time Recorder Co.* (3) One and the same fact forms the basis of both these actions —namely, the agreement between the appellant and the Marchioness Curzon of Kedleston. Therefore these two actions might originally have been joined on one writ. There can consequently be no substantial objection to the application to consolidate them: *Horwood* v. *Statesman Publishing Co.* (4)

Gentle (*Tristram Beresford* with him) for the respondents. The Rule Committee who in 1926 amended Order XLIX., r. 8, must have been well aware of the amendment of Order XVI., r. 1, in 1896, and of the cases, *Thomas* v. *Moore* (2), *In re Beck; Attia* v. *Seed* (5), and *Payne* v. *British Time Recorder Co.* (3), decided upon the meaning and effect of that amendment. Yet they expressly provided, and their resolutions have statutory effect, that the principles governing the consolidation of actions should be those in operation before and not after the amendment of Order XVI., r. 1. There can be no doubt that before that date these actions could not have been consolidated. Until 1897 an order for consolidation could only be made on the application of the defendant. In *Martin* v. *Martin & Co.* (6) this Court decided that an order might be made at the instance of the plaintiff; but, even so, the order would not be made except where the issues and the evidence in the several actions were the same, so that the decision in one of the actions would bind the parties in the others: Lush's Practice of the Superior Courts of Law, 3rd ed., by Dixon (1865), vol. 2, p. 964. Of the actions in question in this appeal one is for unliquidated damages for breach of contract; the other was originally upon a specially indorsed writ for money paid by the plaintiff at the defendant's request, to which a claim for an unliquidated sum for a wrongful revocation of authority was subsequently added.

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(1) 100 L. T. 61.
(2) [1918] 1 K. B. 555.
(3) [1921] 2 K. B. 1.
(4) (1929) 141 L. T. 54.
(5) (1918) 118 L. T. 629.
(6) [1897] 1 Q. B. 429.

Counsel was not called upon in reply.

SCRUTTON L.J. Two actions are brought by Col. Bailey, one against Lady Curzon of Kedleston and the other against her son by an earlier marriage, Mr. Duggan. Undoubtedly the two actions contain much matter in common. We are told that Mr. Duggan is a man of twenty-seven or twenty-eight years of age, but apparently his financial proceedings render it necessary that, if possible, some one should look after him. Col. Bailey was allowed by both mother and son to act the part of " bear leader," as it used to be called, not always with justice to bears. The two actions with separate writs and separate pleadings proceeded to joinder of issue, and then the plaintiff applied to consolidate them. Clearly, if tried, they will involve a good deal of discussion of the relations between the three parties concerned. The Master made an order consolidating the actions. Acton J. reversed that order, thinking that he was bound by *Lee* v. *Arthur*. (1) The plaintiff appeals.

Within the last twenty years a complete change has taken place in the attitude of the Courts towards the joinder of parties and causes of action on the same writ. After a number of cases all pointing to the necessity for an amendment, Order XVI., r. 1, was amended and now stands in this form: " All persons may be joined in one action as plaintiffs, in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative where if such persons brought separate actions any common question of law or fact would arise." . . . . That relates to the joinder of plaintiffs. The rule relating to defendants

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(1) 100 L. T. 61.

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is Order xvi., r. 4 : "All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative." This rule, it will be noticed, omits the words "arising out of the same transaction or series of transactions," and the words "where . . . . any common question of law or fact would arise." The first step taken by the Court was to hold that r. 4 covered the same ground as r. 1. The next was to decide that, notwithstanding certain decisions limiting the power of joining matters and parties on one writ, those rules were to be construed liberally, with the result that many matters, formerly the subject matter of separate actions, could now be tried in one action. I need only refer to *Payne* v. *British Time Recorder Co.* (1), in which elaborate judgments were delivered by Lord Sterndale M.R. and myself, and where I concluded my judgment by saying: "The result of the later decisions is that you must look at the language of the rules and construe them liberally, and that where there are common questions of law or fact involved in different causes of action you should include all parties in one action, subject to the discretion of the Court, if such inclusion is embarrassing to strike out one or more of the parties."

That relates to the joinder of parties and causes of action on one writ. Consolidation affects the litigation at another stage. When several actions have already been brought, raising matters which might have been joined on one writ, what power has the Court to order that they shall be tried together? Order xlix., r. 8, provides the machinery by which this may be done. It is in these terms: "Causes or matters pending in the same Division may be consolidated by order of the Court or a Judge in the manner in use immediately before November 1, 1875, in the Superior Courts of Common Law." A question arises upon the meaning of the last words of that rule. Do they mean that no order for consolidation can be made at the present day unless it could have been made before November, 1875, or that if an order is made now it shall operate as such an order operated before

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(1) [1921] 2 K. B. 1, 16.

November, 1875. In my opinion *Horwood* v. *Statesman Publishing Co.* (1) concludes that question in this Court. I said: "In my view, 'in the manner in use immediately before November 1, 1875,' certainly does not refer to the subject matter, because the rules have all been altered since November 1, 1875, and matters may now be included in the same writ which could not have been included before November 1, 1875. The rule, so far as it relates to subject matter, must be interpreted, in my view, in view of the change of rules with regard to parties and causes of action in Order XVI." I proceeded to mention some of the cases which showed the process of the change. Sankey L.J., who was the other member of the Court, expressed his views in his own words.

The learned judge in Chambers has thought that *Lee* v. *Arthur* (2) prevented him from consolidating these two actions. But since that case was decided the change to which I have referred has taken place. Much greater latitude is allowed in making these orders, with the object of avoiding multiplicity of actions and, where various interests in one common subject matter are involved all the parties concerned, within reasonable limits, may now be joined as parties so that the Court may adjudicate upon their various rights and interests. Consequently *Lee* v. *Arthur* (2) has ceased to be a binding authority, together with a number of other cases which decided that certain parties and causes of action could not be joined in the same writ; and the learned judge was wrong in considering himself bound to follow that case.

There remains the question whether as a matter of discretion it is better that these two actions should be heard together. Plainly there is common ground between them in the agreement which Lady Curzon of Kedleston is said to have made with the appellant; and the relation between the appellant and Mr. Duggan must be considered in order to arrive at a just conclusion; and I have come to the conclusion, as a matter of discretion and in order to avoid expense, that these matters should be discussed in one action.

(1) 141 L. T. 54, 57.

(2) 100 L. T. 61.

The appeal must be allowed and the order of the Master restored; but, as the expense of two writs and two sets of pleadings ought never to have been incurred, there shall be no costs of the application to consolidate, and on taxation the costs of one set of pleadings only shall be allowed.

GREER L.J. I agree. Apart from certain recent decisions I should have thought there was a good deal to be said for the argument for the respondents upon the meaning of Order XLIX., r. 8, which says, "Causes or matters pending in the same Division may be consolidated by order of the Court or a Judge in the manner in use immediately before November 1, 1875, in the Superior Courts of Common Law." It is difficult to suppose that by using the words "in the manner in use immediately before November 1, 1875," the framers of this rule were referring merely to the process by which consolidation should be effected; because obviously it could only be brought about in one way—namely, by an order of the Court; and, but for decisions lately given, I should have read the rule as providing that an order for consolidation may now be made in the cases in which such an order was made before that date. But I regard *Horwood* v. *Statesman Publishing Co.* (1), a decision of this Court, as putting a different meaning upon the rule, and therefore I agree with the judgment just delivered by Scrutton L.J.

SLESSER L.J. I agree, and would only add that I think the statement as to the practice contained in the Annual Practice for 1932, p. 875, is liable to be misunderstood. The learned editors say, speaking of Order XLIX., r. 8: "But the rule does not authorize actions commenced by the same plaintiff against different defendants, and pending in the same Division, to be consolidated at the instance of the plaintiff without the consent of all parties, unless the issues to be tried are precisely similar"; and they cite in support of that statement *Lee* v. *Arthur*. (2) As I read the subsequent cases, and particularly *Horwood* v. *Statesman Publishing Co.* (3)

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(1) 141 L. T. 54.

(2) 100 L. T. 61.

(3) 141 L. T. 54, 57, 58.

and the observations of Scrutton and Sankey L.JJ. in that case, the power to consolidate actions is no longer subject to the limitation imposed by *Lee* v. *Arthur*. (1) The practice seems to me to be more accurately stated in the Yearly Practice of the Supreme Court, 1932, p. 852, as follows: "The cases as to when consolidation will be granted or refused seem to disclose no principle, and the decisions depend mainly upon the special circumstances of each case. . . . The Court has a discretion to order consolidation even where the facts in the two actions are not precisely similar."

Appeal allowed.

Solicitors for appellant: *Baileys, Shaw & Gillett.*
Solicitors for respondents: *Withers & Co.*

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(1) 100 L. T. 61.

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THE KING *v.* EDITOR, PRINTERS AND PUBLISHERS OF THE DAILY HERALD AND ANOTHER.

Ex parte THE BISHOP OF NORWICH.

THE KING *v.* EDITOR, PRINTERS AND PUBLISHERS OF THE EMPIRE NEWS AND ANOTHER.

Ex parte SAME.

Contempt of Court—Consistory Court—Publication calculated to prejudice fair Hearing of Complaint—Jurisdiction of King's Bench Division to issue Writ of Attachment—Ecclesiastical Courts Act, 1813 (53 *Geo.* 3, *c.* 127)—*Ecclesiastical Courts* (*Contempt*) *Act,* 1832 (2 & 3 *Wm.* 4, *c.* 93).

The publication of a statement tending to prejudice the fair hearing of a complaint preferred in a Consistory Court constitutes a contempt of that court, and the King's Bench Division of the High Court has inherent jurisdiction to protect the Consistory Court by issuing a writ of attachment for contempt of court against the person or persons making the statement with a view to publication or publishing it or causing it to be published.

Rex v. *Daily Mail. Ex parte Farnsworth* [1921] 2 K. B. 733; *Ricketts* v. *Bodenham* (1836) 4 A. & E. 433; and *Burder* v. *Veley* (1840) 12 A. & E. 233 applied.

Two Orders Nisi for writs of attachment for contempt of court.

By a complaint dated January 8, 1932, and laid before the Consistory Court of the diocese of Norwich, the Bishop of Norwich preferred certain charges under the Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), against the Rev. H. F. Davidson, rector of Stiffkey-with-Morston in that diocese, one of these charges being that the defendant had been guilty of immoral conduct with a woman named Rose E. Ellis on many occasions.

On January 21, 1932, the complaint was served upon the defendant, and the hearing thereof was fixed for March 1, 1932.

In the issue of the Daily Herald of February 4, 1932, there appeared an article headed "Woman's Own Story in Rector Case," consisting of statements alleged to have been made by the said Rose E. Ellis to a representative of that newspaper to the effect that two persons had been brought to see

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her about Mr. Davidson, that she told them that she had known him for eleven years during which time he had been very kind to her and that he had never been immoral with her, that afterwards when under the influence of drink and on being promised money she made a statement to one of these persons, which was untrue, that Mr. Davidson had behaved improperly, that without dreaming of the consequences she took 10*s.* which was offered to her, and that when she realized what she had done she made an affidavit retracting what she had said.

In the issue of the newspaper Empire News, dated February 7, 1932, there appeared an article headed "Challenge to my Traducers: By the Rector of Stiffkey. 'Bribery, Corruption, and Blackmail,'" prefaced with an assertion that the rector was determined to refute "the vile accusations mysteriously launched against him," and containing a statement purporting to have been made by the rector, setting forth that he had determined to place before the public a letter which he had written to the Bishop so that they might understand "upon what evidence some of the accusations have been made," and that the woman who made the statements upon which one of the charges was based had sworn an affidavit acknowledging that they were untrue; and in the issue of the same newspaper dated February 14, 1932, there appeared a further article headed "Why I am Fighting. Disclosures by the Rector of Stiffkey," being a continuation of the former statement, in which it was alleged that the woman had been approached by inquiry agents for information about him of a detrimental character.

On February 15, 1932, the Bishop of Norwich obtained an order nisi calling upon the editor, printers and publishers of the Daily Herald and the rector to show cause why a writ or writs of attachment should not issue against them for their contempt in printing and publishing or causing to be printed and published the matter above referred to as having appeared in that newspaper, and against the rector for making such statements or some of them with a view to publication and for causing or authorizing them or some of them to be published in these issues, on the ground that the matter was calculated to prejudice the fair hearing of the complaint; and on the same date the Bishop obtained an order nisi in similar form calling upon the editor, printers and publishers of the Empire News and the rector to show cause why a writ or writs of attachment should not issue against them in respect of the matter above referred to as having appeared in that newspaper, on the same ground.

In support of the application for the orders nisi an affidavit was made by a member of the firm of solicitors acting for the Bishop in which he stated (inter alia) that any one who acquired knowledge of the complaint against the rector must have known that Rose E. Ellis would be a material witness for the prosecution at the hearing thereof; and that he submitted that the respective publications in the Daily Herald and the Empire News constituted contempts of the Consistory Court and an interference with the due administration of justice in the matter of the complaint, and were calculated seriously to affect the giving of evidence before that court not only by Rose E. Ellis but also by other witnesses.

Each of the parties to whom the order nisi was directed showed cause, and an affidavit was made by or on behalf of each of them stating that, if any of the matters complained of with which that party was concerned amounted to a contempt of the Consistory Court, then that party expressed sincere regret that the matters had been published and apologized to the High Court and to the Consistory Court. The names of the persons who made these affidavits and their further depositions therein shortly stated were as follows: Mr. William H. Stevenson, the editor of the Daily Herald, stated that whilst fully accepting responsibility for the publication of the matter therein, he did not see that matter before its publication; and that it was his constant endeavour to prevent the publication in the Daily Herald of any matter that might appear to prejudice the fair trial of any legal issues or to interfere with the administration of justice. Mr. Thomas S. Darlow, an assistant editor of the Daily Herald, stated that he read the article in that newspaper which contained the matter complained of and passed it for publication; and that when he did so it did not occur to him that its publication could be regarded as a contempt of court. Mr. Julius S. Elias, managing director of Odhams Press, Ld., the printers of the Daily Herald, and chairman and managing director of the Daily Herald (1929), Ld., the publishers of that newspaper, stated that he made his affidavit on behalf of himself and of these companies with their authority; and that he was not in any way concerned with the publication of the matter complained of. Mr. Michael R. Lawson, of Manchester, the editor of the Empire News, stated that that newspaper was printed in Manchester, that the said matter therein was received by him in the ordinary course from the London editor, and that it did not occur to him that its publication might amount to a contempt of the Consistory Court; that he understood that a legal opinion had been expressed to the effect that in the case of that court proceedings for contempt were not possible, and that relying upon that opinion he permitted the publication of the matter; and that he had taken the utmost care during the past eleven years to avoid publishing any matter which might be regarded as a contempt of Court, and that since June, 1920, no complaint had been made that the Empire News had offended in that way. Mr. James Tevnan, the London editor of the Empire News, stated that the said matter therein was sent by him to Manchester for publication therein, that the opinion had been expressed to him by a lawyer that in the case of the Consistory Court no proceedings for contempt were possible, that bearing in mind that opinion he assured Mr. Lawson that it would be safe to publish the matter in question, that he always had taken the utmost care to insure that nothing appeared in the Empire News which would give cause for complaint, and that if he had had even a suspicion that the matter complained of might constitute a contempt of court he should not have sent it for publication; and that he had done so in the honest belief that the matter could be published without offence. Mr. William Will, a director of Allied Newspapers, Ld., the printers and publishers of the Empire News, stated, on behalf of that company, that the conduct of that newspaper was in the hands of the editor, in whose discretion the board of directors had complete confidence, that he had no reason to doubt that the account given in the affidavit of Mr. Lawson of the publication of the matter complained of was true. The Rev. H. F. Davidson stated that he had no knowledge of the matter published in the Daily Herald until he read it in that newspaper, and that he never gave authority to that newspaper to publish that or any article with reference to the complaint before the Consistory Court; that he admitted that he authorized the publications in the Empire News; that in a certain newspaper other than those above mentioned an article had appeared which in his opinion was calculated to prejudice his case, but that on inquiry he was advised by a lawyer that no proceedings for contempt of the Consistory Court could be instituted; and that when authorizing the publication of the articles in the Empire News he had in mind the advice which he had received and did not at any time think that he was in contempt of the Consistory Court.

Norman Birkett K.C. and *Theobald Mathew*, for the editor, printers and publishers of the Daily Herald, showed cause: If the publication of the matter complained of which appeared in the Daily Herald amounted to a contempt of the Consistory Court by the editor, printers and publishers of that newspaper with which this Court has jurisdiction to deal, then these parties, as appears from the affidavits made by or on behalf of them, desire to express their profound regret and to offer their humble apologies to this Court and to the Consistory Court. This Court may, however, be of opinion that this is not a case to which its jurisdiction extends. It is no doubt well settled that this Court has inherent jurisdiction to protect against contempt every inferior court which is not otherwise protected, and to punish the person committing the contempt. The jurisdiction extends to all inferior courts which are King's Courts, not excepting a court martial: *Rex* v. *Daily Mail. Ex parte Farnsworth* (1), unless it be ousted by some statute which confers upon the inferior court the power of protecting itself. In the present case, however, the inferior court against which the contempt is alleged is a Consistory Court, which is not a King's Court, but an ecclesiastical court, being the court of the bishop's diocese from which there is an appeal to the Court of Arches and an ultimate appeal to the King as head of the Church; and it would seem that contempts of that court could from the first be punished by sentence of excommunication and that the protective jurisdiction of this Court did not extend to it. Even if the Consistory Court is an inferior court to which the protective jurisdiction of this Court would otherwise have extended, that jurisdiction would appear to have been ousted by certain statutes giving that court power to protect itself. The Ecclesiastical Courts Act, 1813, s. 1, provides that when a person shall commit a contempt in the face of an ecclesiastical court it shall be lawful for the judge to pronounce him contumacious and in contempt and to signify the same to the Court of Chancery, from which a writ de contumace capiendo shall issue. The Ecclesiastical Courts (Contempt) Act, 1832, s. 1, provides that when any person shall commit a contempt in the face of an ecclesiastical court it shall be lawful for the judge to pronounce him contumacious and in contempt and to signify the same to the Lord Chancellor, and thereupon a writ de contumace capiendo shall issue from the Court of Chancery. Even although this Court has jurisdiction to punish persons who commit contempt of a Consistory Court, it is submitted that any contempt of that court committed by the present parties may be treated as purged by their apologies.

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(1) [1921] 2 K. B. 733.

Sir P. Hastings K.C., *Theobald Mathew* and *John Davidson*, for the editor, printers and publishers of the Empire News, showed cause: If the publication of the articles in the Empire News of which complaint is made, constituted a contempt of the Consistory Court with which this Court has jurisdiction to deal, then the editor, printers and publishers of that newspaper express their regret for the publication of the articles and offer their apologies to this Court and to the

Consistory Court. Inasmuch, however, as there appears to be no record of any previous case of contempt of a Consistory Court, it may be desirable to place before this Court every consideration on each side which may help it to come to a decision. The King's Bench Division of the High Court has undoubtedly jurisdiction to attach and punish a person who commits a contempt of any inferior court which has no power to protect itself; but, conversely, it can have no such jurisdiction in respect of an inferior court, which by its original constitution or by statute has itself power to punish for contempt: see *Rex* v. *Davies* (1) and *Rex* v. *Daily Mail. Ex parte Farnsworth.* (2) Consistory and other ecclesiastical courts have existed since soon after the Norman Conquest, or perhaps even since Saxon times: see Phillimore's Ecclesiastical Law, 2nd ed., vol. i., p. 197; but there does not seem to have been any express provision defining the power of these courts in respect of contempts until the passing of the Ecclesiastical Courts Act, 1813, and the Ecclesiastical Courts (Contempt) Act, 1832. In former times it could hardly have been doubted that the power of the bishop extended to the punishment of contempt of the Consistory Court of his diocese; and that view would appear to be borne out by the Act of 1832, which by the express terms of s. 1 thereof gives power to the ecclesiastical court to deal with contempts committed only by persons domiciled or residing beyond the limits of the jurisdiction of the court, thus implying that the court already had power to deal with contempts by persons within its jurisdiction. Even if the Consistory Court had not originally power to punish for contempt, it is submitted that by virtue of the Acts of 1813 and 1832 that court now has power to punish a person committing a contempt in the face of that court, or any other contempt towards itself, by pronouncing him contumacious and in contempt and signifying the same to the Lord Chancellor, whereupon a writ de contumace capiendo issues against him from Chancery. If the Consistory Court has power, either original or statutory, to punish persons guilty of contempt towards that court,

(1) [1906] 1 K. B. 32.

(2) [1921] 2 K. B. 733.

then the jurisdiction of this Court to punish such persons is ousted, and the present proceedings are not maintainable. As the editor of the Empire News had been informed of a legal opinion that contempt could not be committed of a Consistory Court, he and the other persons concerned in the production of that newspaper were justified in acting upon that opinion.

Samuel K.C. and *E. Ryder Richardson* for the Rev. H. F. Davidson showed cause. As to the article complained of which appeared in the Daily Herald on February 4, 1932, the Rev. H. F. Davidson had no knowledge of that article until after it had been published in that newspaper, and he never authorized the publication in that newspaper of that or any article relating to the cause before the Consistory Court; and therefore he can be under no liability for that article, and so far as he is concerned the present application in respect of it is misconceived. As to the articles complained of which appeared in the Empire News, and of which the Rev. H. F. Davidson admits that he authorized the publication, even if these articles constituted contempts of the Consistory Court, this Court has no jurisdiction to issue a writ of attachment in respect of them, inasmuch as the jurisdiction of this Court, if it ever existed, to protect the Consistory Court has been ousted by the Acts of 1813 and 1832, which confer upon the Consistory Court itself ample power to deal with contempts committed against it. On this point it is desired to adopt on behalf of the Rev. H. F. Davidson the argument which has been advanced on behalf of the Empire News. The fact that the Rev. H. F. Davidson before authorizing the publication of the articles in the Empire News had obtained the opinion of a lawyer to the effect that comments upon proceedings in a Consistory Court did not constitute contempt of court, affords, if need be, some excuse for his action in the matter. The only way in which these articles could tend seriously to interfere with the proceedings in that court would be by exerting an influence upon the mind of the learned Chancellor of the diocese, and it is inconceivable that they could exert any such influence. If in the opinion of this Court the Rev. H. F. Davidson has been guilty of contempt of the Consistory Court it is desired that the taking of these legal points may in no way qualify his expression of regret and of apology to this Court and the Consistory Court.

Roland Oliver K.C., *Walter Monckton K.C.* and *Humphrey King* in support of the orders nisi. The publication of each of the articles complained of constituted a serious contempt of the Consistory Court, inasmuch as it tended to prejudice the fair trial of the complaint preferred in that court. Each of them represents the case of the prosecutor as being influenced by evil motives and that of the defendant as highly meritorious. It must have been obvious to the writers and publishers of the articles that many of the witnesses at the trial in the Consistory Court would be persons belonging to a class of the community which is specially likely to be influenced by articles of that type, and that the publication of the articles would create an atmosphere very unfavourable to the proper conduct of that trial. The statements made by the several parties showing cause, to the effect that they thought they could safely publish the articles without fear of punishment, go to show that the articles were published deliberately and as the result of a pre-determined plan to influence the witnesses and to enable the Rev. H. F. Davidson to make money thereby. This Court has inherent jurisdiction to protect the Consistory Court against any contempt of its authority and to punish the person committing it. In every case in which the King's Bench Division has power to correct an inferior court by preventing irregularities therein, it also has power to protect that court from contempts tending to obstruct the administration of justice therein, unless a statute by giving the inferior court power to protect itself has ousted the jurisdiction of the higher Court: *Rex* v. *Daily Mail. Ex parte Farnsworth.* (1) The Consistory Court is an inferior court which this Court has inherent jurisdiction to correct, as by a writ of prohibition to restrain it from exceeding its authority: *Ricketts* v. *Bodenham* (2); *Burder*

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(1) [1921] 2 K. B. 733, 745, 750, 752.

(2) 4 A. & E. 433.

v. *Veley* (1); and Short and Mellor's Crown Practice, 2nd ed., p. 258. It follows that the Consistory Court is an inferior court which this Court has inherent jurisdiction to protect by punishing those who treat it with contempt, unless some statute has ousted that jurisdiction by giving the Consistory Court power to protect itself or otherwise. It is only by clear and unequivocal language that a statute can oust the inherent jurisdiction of this Court over an inferior court: *Rex* v. *Daily Mail. Ex parte Farnsworth.* (2) The inherent jurisdiction of this Court to protect the Consistory Court has not been affected by any statute. The Ecclesiastical Courts Act, 1813, and the Ecclesiastical Courts (Contempt) Act, 1832, do not give the Consistory Court power to protect itself against contempt and to punish the offender. These Acts merely provide machinery by which a writ de contumace capiendo can be obtained from Chancery directed to the person who has committed the contempt. Though the two older cases cited were both decided after the date of the later of these two Acts, the point was not taken in either of these cases that the inherent jurisdiction of this Court over the Consistory Court was ousted by these Acts. From the facts disclosed in the affidavits it would appear that the Rev. H. F. Davidson must have known beforehand about the article in the Daily Herald as well as about the other articles, and that he deliberately embarked on a newspaper campaign for the purpose of benefiting himself and prejudicing the complainant in the case before the Consistory Court.

LORD HEWART C.J., in delivering the judgment of the Court, said: These are two orders nisi for writs of attachment for contempt of court. In each of the two cases the application for the order has been made at the instance of the Bishop of Norwich, and the alleged contempt consists in the publication of matter calculated to prejudice the fair hearing of a complaint preferred by the Bishop under the Clergy Discipline Act, 1892, against the Rev. H. F. Davidson

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(1) 12 A. & E. 233.

(2) [1921] 2 K. B. 733, 747.

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in the Consistory Court of the diocese of Norwich upon charges of immoral conduct. The persons to whom the first of the two orders nisi is directed are the editor, printers and publishers of the Daily Herald, and those to whom the second of them is directed are the editor, printers and publishers of the Empire News, and in each case the Rev. H. F. Davidson himself.

The Court has heard a long and interesting argument on the question of its jurisdiction in such a case as this. None of us has any doubt that this Court has jurisdiction. The jurisdiction is inherent, and just as by virtue of that jurisdiction this Court may correct an inferior court such as a Consistory Court, so also in proper circumstances it may protect an inferior court of the same kind. That this is so is made clear by the cases of *Rex* v. *Daily Mail. Ex parte Farnsworth* (1); *Ricketts* v. *Bodenham* (2); and *Burder* v. *Veley* (3), to which I need not refer at length. I will read only a short passage from one of them with reference to the argument that a provision in a statute has in this instance taken away the inherent jurisdiction of the Court. In *Rex* v. *Daily Mail. Ex parte Farnsworth* (4) Avory J., dealing with a similar argument based upon s. 126 of the Army Act, 1881, said: "I find in that section no provision either express or implied which takes away the right of a party to proceedings before a court martial who is aggrieved by a contempt of that court to move this Court to exercise the inherent jurisdiction which it possesses over all inferior courts." Similar considerations in our opinion apply here, and the inherent jurisdiction of this Court over the Consistory Court remains untouched by the Ecclesiastical Courts Act, 1813, and the Ecclesiastical Courts (Contempt) Act, 1832.

In some respects this was a gross contempt, and we have discussed with care what the appropriate penalties should be. We think it is quite clear that the Bishop of Norwich ought not to be called upon to pay any costs at all in the matter. We think that the rules should be made absolute, and we impose a fine of 100*l.* in the case of the Empire News, and a fine of 50*l.* in the case of the Daily Herald, and we think that all the parties should be ordered to pay the costs of the Bishop of Norwich as between solicitor and client. The order is made against all the defendants. The writs will lie in the office for fourteen days.

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(1) [1921] 2 K. B. 733.

(2) 4 A. & E. 433.

(3) 12 A. & E. 233.

(4) [1921] 2 K. B. 733, 753.

Orders absolute.

Solicitors: *John T. Monks; Theodore Goddard & Co.; Glynn Barton & Co.; Lee, Bolton & Lee.*

J. R.

PAYNE *v.* ALLCOCK.

1932
April 22.

Motor-car—Revenue—Mechanically-propelled Vehicle—Private Car used for Conveyance of Goods—" In the course of trade "—Finance Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 18), *Second Schedule—Finance Act,* 1922 (12 *&* 13 *Geo.* 5, *c.* 17), *s.* 14*—Finance Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 22), *s.* 13, *and First Schedule—Finance Act,* 1928 (18 *&* 19 *Geo.* 5, *c.* 17), *s.* 12, *and Third Schedule.*

In 1931 the appellant, who carried on business as a greengrocer at Neath in Glamorganshire, held a licence for a private motor-car, duty being paid thereon at the " horse-power " rate under the Finance Act, 1920, Sch. II., para. 6. The car was neither " constructed " nor " adapted " for use for the conveyance of goods, but the appellant, while the licence was in force, used it occasionally for the conveyance of goods in the course of his trade. An information was preferred against him at Cardiff under the Finance Act, 1922, s. 14, on the ground that this user was for a purpose which brought the car within a class to which the higher rate of duty under Sch. II., para. 5, of the Act of 1920 became chargeable. Upon this the appellant was convicted and fined:—

Held, by the Divisional Court (Lord Hewart C.J. and Avory J.; Macnaghten J. dissenting), that the user was " for a purpose " which brought the car within the Finance Act, 1920, Sch. II., para. 5, and that the appellant was rightly convicted.

CASE stated by Cardiff stipendiary magistrate.

On July 29, 1931, at a court of summary jurisdiction at Cardiff, the appellant was charged on an information preferred by the respondent, local taxation officer of the Cardiff City

Council, under the Finance Act, 1922, s. 14. (1) The information charged him that, having taken out a licence for a mechanically-propelled vehicle under the Finance Act, 1920, Sch. II. (1), he unlawfully used the vehicle for a purpose whereby a higher rate of duty was applicable under the Schedule, the higher rate of duty not having been paid before the vehicle was so used.

The stipendiary magistrate convicted the appellant and fined him ten shillings.

The facts and arguments according to the case stated were as follows :—

The appellant had taken out a licence for a Singer motor-car under para. 6 of Sch. II., and had paid the duty chargeable thereon. The car had a rating of 16 h.p., the duty being 16*l*. The car was of the ordinary saloon type, with two seats for passengers, and had not been constructed or adapted for use for the conveyance of goods. Its weight unladen was 23¼ cwt., and the duty, if chargeable under para. 5 (*d*), would be 20*l*. The appellant was a greengrocer and florist, and carried on business at Glyn-Neath, Glamorgan. On May 21, 1931, he drove the car in North Road, Cardiff. The back portion of the car was filled with goods consisting of vegetables, fruit and boxes of flowers. No alteration had been made in the construction of the car, nor had anything been done to adapt it for the purpose of using it for the conveyance of such goods. The appellant used the car occasionally for the conveyance of goods in connection with his trade.

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(1) The Finance Act, 1922, s. 14, provides :—

Sub-s. 1 : " Where a licence has been taken out for a mechanically-propelled vehicle at any rate under the Second Schedule to the Finance Act, 1920, and the vehicle is at any time while such licence is in force used in an altered condition or in a manner or for a purpose which brings it within, or which if it was used solely in that condition or in that manner or for that purpose would bring it within, a class or description of vehicle to which a higher rate of duty is applicable under the said schedule, duty at such higher rate shall become chargeable in respect of the licence for the vehicle."

Sub-s. 2 : "Where a licence has been taken out for a mechanically-propelled vehicle, and by virtue of such user as aforesaid, a higher rate of duty becomes chargeable, and duty at the higher rate was not paid before the vehicle was so used, the person so using the vehicle shall be liable to a penalty of an amount equal to three times the difference between the duty actually paid on the licence and the amount of duty at such higher rate or twenty pounds, whichever amount is the greater."

The Finance Act, 1920, Sch. II. (as amended by the Finance Act, 1926, s. 13 ; the Finance Act, 1927, s. 11 ; the Finance Act, 1928, s. 12 ; and the Finance Act, 1930, s. 6), provides (inter alia) :—

" Paragraph 5.—Vehicles, including tricycles weighing more than 8 cwt., unladen, constructed or adapted for use, and used for the conveyance of goods or burden of any description, whether in the course of trade or otherwise . . . .

(*d*) Being vehicles other than vehicles chargeable with duty under the foregoing provisions of this paragraph :—

Exceeding one ton but not exceeding 1½ tons in weight unladen . . £20

Paragraph 6.—Any vehicles other than those charged with duty under the foregoing provisions of this schedule :—

Not exceeding six horse power, or electrically propelled £6

Exceeding six horse power, £1 for each unit or part of a unit of horse power."

It was contended for the appellant that to render a motor-car subject to the higher rate of duty prescribed by para. 5 (*d*) it was necessary that it should not only be used for the conveyance of goods but also be constructed or adapted for such use, and that as the car had not been so constructed or adapted the information should be dismissed.

It was contended on behalf of the respondent that the mere fact that the motor-car was used for the purpose of the conveyance of goods was sufficient to render it liable to the higher rate of duty.

The magistrate was of opinion that the essence of the offence created by the Finance Act, 1922, s. 14, was user; that the question of construction or adaptation of the motor-car for the conveyance of goods was not an essential ingredient of the offence; and that the car had been used for a purpose which brought it within a class of vehicle to which a higher rate of duty was applicable. He therefore convicted the appellant.

The question for the opinion of the Court was whether the magistrate's determination was correct.

Marriott K.C. and *King-Hamilton* for the appellant. This conviction cannot be supported. The licence taken out was for a private car under para. 6 of Sch. II. to the Finance Act,

1920. Para. 5 of Sch. II. applies to vehicles "constructed or adapted for use, and used solely for the conveyance of goods in the course of trade" and it was only in such circumstances that the higher rate was chargeable. The Finance Act, 1922, s. 14, imposes the higher rate where the vehicle is "used in an altered condition or in a manner or for a purpose which brings it within, or which if it was used solely in that condition or in that manner or for that purpose would bring it within, a class" to which a higher rate of duty applies. To construe that section one must consider the conditions applicable when the Finance Act, 1920, Sch. II., was in force. Construction or adaptation "solely for the conveyance of goods in the course of trade" is therefore essential before the higher duty is chargeable. The amendments to the Act of 1920, Sch. II., ought not to be considered upon proceedings under the Act of 1922, s. 14.

[LORD HEWART C.J. The Finance Act, 1922, s. 14, brings into para. 5 cases where a car is used occasionally for trade purposes.]

The "user" in s. 14 is only intended to cover cases where a vehicle is used occasionally as a hackney carriage, as happened in *Rex* v. *Wood. Ex parte Anderson.* (1) No question arises here of an alteration in the condition of the car, nor was it constructed or adapted for conveying goods in the course of trade. Even if the matter is open to doubt, the appellant should succeed. For in questions of taxation, if there is a doubt, the statute should be construed in favour of the subject.

Trevor Morgan for the respondent. The Roads Act, 1920 (10 & 11 Geo. 5, c. 72), s. 8, sub-s. 2, imposes an excise penalty, where a licence is taken out for a vehicle "to be used solely for a certain purpose" and during the period of the licence it is used for another purpose, for which the duty is higher. The words "to be used solely for a certain purpose" do not appear in the Finance Act, 1922, s. 14, which is meant to cover occasional user for conveyance of goods and has a wider scope than the Finance Act, 1920. The Finance Act,

(1) [1922] 1 K. B. 674.

1926, Sch. I., para. 5, the Finance Act, 1928, Sch. III., para. 5, and the Finance Act, 1930, s. 6, which amend the Finance Act, 1930, Sch. II., include vehicles "constructed or adapted for use and used for the conveyance of goods or burdens of any description in the course of *trade or otherwise.*" The words "or otherwise" were intended to be ejusdem generis with trade. It is sufficient here to contend that this user, even if occasional for the purpose of trade, was enough to bring the case within the Finance Act, 1922, s. 14, and under the higher rate prescribed in the Act of 1920, Sch. II., para. 5. The conviction by the magistrate was right and should be upheld.

MACNAGHTEN J. In this case I am unable to arrive at the same conclusion as my Lord and my brother Avory J., and it therefore falls to my lot to deliver the reasons for my opinion first. The decision of the stipendiary magistrate was in my opinion erroneous, and the appeal should, I think, be allowed.

By s. 13 of the Finance Act, 1920, duties of excise at the rates specified in the Second Schedule to that Act were imposed in respect of mechanically-propelled vehicles used on public roads in Great Britain and Ireland; and it was provided that the duty in respect of any such vehicle should be paid upon the licence to be taken out by the person keeping the vehicle. The Schedule specifying the rates of the duties as amended by subsequent Finance Acts divides mechanically-propelled vehicles into six classes—namely: (1.) bicycles and tricycles; (2.) vehicles for invalids; (3.) vehicles used as hackney carriages; (4.) certain vehicles used solely in the course of trade or in agriculture; (5.) vehicles . . . . constructed or adapted for use and used for the conveyance of goods or burden of any description whether in the course of trade or otherwise; (6.) vehicles which do not come within any of the five preceding classes. The duty in respect of vehicles in the fifth class is calculated on their weight: the duty in respect of vehicles in the sixth class is calculated on the horse power of the engine.

The appellant, who is a greengrocer and florist carrying on business at Glyn-Neath in Glamorganshire, keeps a Singer saloon motor-car. He took out a licence for the car and paid the duty prescribed for vehicles which do not come within any of the first five classes mentioned in the Schedule. The car was rated at 16 h.p., and he paid 16*l.* by way of duty. If the car had come within the fifth class, the duty would have been 20*l.* Sect. 14 of the Finance Act, 1922, provides that where a mechanically-propelled vehicle is used in a manner or for a purpose which brings it within a class or description of vehicle to which a rate of duty higher than the rate actually paid is applicable, then duty at such higher rate shall become payable, and the person so using the vehicle shall be liable to a penalty.

The appellant used his car for the carriage of goods in the course of his trade: and in consequence thereof he has been convicted by the stipendiary magistrate of an offence under s. 14 of the Finance Act, 1922. The magistrate held that, although the car was not constructed or adapted for use for the conveyance of goods, nevertheless the user of the car for that purpose made it liable to the 20*l.* duty. The question at issue on this appeal is whether that decision is correct in law.

The argument for the appellant is that the 20*l.* duty is not payable, because the car is not "constructed or adapted" for use for the conveyance of goods. I think that this contention is correct. In my view the Schedule is so framed as to attract the higher rate of duty to those vehicles which are not only used but are also constructed or adapted for use for the conveyance of goods; and that if a saloon car, which is not constructed or adapted for use for the conveyance of goods, is in fact so used, it does not thereby become liable to the higher duty. In short, that the word "and" in the description of the vehicles coming under the fifth class in this Schedule means "and" and cannot be construed as if it were the word "or." In my view, therefore, the appeal should be allowed.

AVORY J. I have come to the conclusion that the learned magistrate was right in this case in convicting the appellant of the offence which is created by the Finance Act, 1922, s. 14. The only question which appears to me to arise under that section is whether the appellant, having taken out a licence for a mechanically-propelled vehicle at a certain rate under the Finance Act of 1920, Sch. II., under para. 6 of that Schedule, has, while such licence was in force, used the vehicle for a purpose which brought it within a class or description of vehicles to which a higher rate of duty was applicable under the said Schedule. With all respect to the judgment of my brother Macnaghten J. and to the argument of Mr. Marriott, it appears to me that to say that it is necessary, in order to bring a case within s. 14, to show that the vehicle has been either constructed or adapted for use for the conveyance of goods, is to ignore the fact that the words in the section are in the alternative. The section refers to cases where the vehicle, while the licence is in force, has been "used in an altered condition or in a manner or for a purpose which brings it within, or which if it was used solely in that condition or in that manner or for that purpose would bring it within, a class or description of vehicle to which a higher rate of duty is applicable." It seems to me that, to construe that section, one has only to see what is the purpose for which the car is being used which will bring it within the class to which a higher rate of duty is applicable. The purpose which here brings it within para. 5, as distinguished from para. 6 of Sch. II., is the purpose of the conveyance of goods under the Act of 1920 and the Schedule; and that must be a conveyance of goods in the course of trade. There is no question in this case that the goods were conveyed in the course of trade. But while coming to that conclusion, I quite appreciate the difficulties that may arise under the Finance Act, 1928, which has in Sch. III. substituted another paragraph for para. 5 of the Finance Act, 1920, Sch. II. I am not at all satisfied that for the purpose of this case it is necessary to consider the effect of that new paragraph in the Act of 1928, bearing in mind that the offence which is created under s. 14 is dealing only with the higher rate of duty applicable under the Schedule to the Act of 1920. Further, if Sch. III. to the Act of 1928 is looked at it will be seen that the purpose of that Schedule is to make a distinction between vehicles fitted entirely with pneumatic tyres and vehicles not fitted with pneumatic tyres, and various rates of duty are imposed according as the vehicles are fitted with pneumatic tyres or otherwise. That being the purpose with which the alteration has been made in this paragraph, there is a sufficient reason for leaving out the words " whether in the course of trade or otherwise," the object being in some way to apportion the rate of duty to the damage or mischief done to the roads by the use of vehicles which are not fitted with pneumatic tyres. However that may be, although I appreciate the difficulty which has presented itself to the mind of Macnaghten J. that the effect of this new Schedule and the new paragraph in the Act of 1928 may have far-reaching effects, even to produce what the ordinary public would call an absurdity, it will be sufficient to deal with that question when it arises. For the moment, all we have to decide, and all that I do decide, is that the magistrate in this case, upon the facts, was right in coming to the conclusion that the appellant was in fact using this vehicle " for a purpose "—namely, for the purpose of the conveyance of goods in the course of trade, which brought it within the class or description of vehicle to which a higher rate of duty was applicable under the said Schedule, and that therefore this appeal ought to be dismissed.

LORD HEWART C.J. This is not by any means a simple case, but while I differ with regret from the judgment of Macnaghten J., I am clearly of the opinion that this appeal ought to be dismissed. It is, I think, important to remember two things: the first is that, notwithstanding subsequent changes in Finance Acts, the Finance Act, 1922, s. 14, is still in force, and sub-s. 1 thereof provides as follows: " Where a licence has been taken out for a mechanically-propelled vehicle at any rate under the Second Schedule to the Finance

Act, 1920, and the vehicle is at any time while such a licence is in force used in an altered condition or in a manner or for a purpose which brings it within, or which if it was used solely in that condition or in that manner or for that purpose would bring it within, a class or description of vehicle to which a higher rate of duty is applicable under the said schedule, duty at such higher rate shall become chargeable in respect of the licence for the vehicle"; and secondly, it is to be observed that the information in this case against the appellant was that, having taken out a licence for a mechanically-propelled vehicle under the Finance Act, 1920, Sch. II., he unlawfully used that vehicle for the purpose whereby a higher rate of duty was applicable under the Schedule, that duty not having been paid before the vehicle was so used. With all respect to the argument of Mr. Marriott, it seems to me that it fails to distinguish the three quite separate matters which may respectively have the effect of bringing in the higher rate of duty. Where a licence has been taken out and the vehicle is at any time while that licence is in force used (*a*) in an altered condition, (*b*) in a manner, or (*c*) for a purpose, which brings it within or which if it was used solely in that condition or in that manner or for that purpose would bring it within a class or description of vehicle to which a higher rate of duty is applicable, then duty at the higher rate becomes chargeable. Mr. Marriott is willing to give full effect to the words "used in an altered condition," but he seems to me entirely to ignore the disjunctive words "or for a purpose," and his argument merely amounts to this, that notwithstanding the Finance Act, 1922, s. 14, a mechanically-propelled vehicle does not come under para. 5 of Sch. II. to the Finance Act, 1920, dealing with duties on mechanically-propelled vehicles, unless, in the absence of the Finance Act, 1922, s. 14, it would have done so; in other words, the argument seems to require that all the conditions required by para. 5 of the Finance Act, 1920, must be fulfilled, if the duty chargeable under that paragraph is to be charged. I cannot help thinking that the object of the Finance Act, 1922, s. 14, was to make those higher duties chargeable in certain other events—namely, where any one of the three conditions specified in sub-s. 1 thereof is fulfilled. I quite agree that when one looks at later developments of the Schedule to the Finance Act, 1920, dealing with amendments of the rates of duty in the case of certain mechanically-propelled vehicles, especially in the Act of 1926 and in the Act of 1928, it is apparent that difficulties may arise, but they do not seem to me to arise in the present case ; nor, in my opinion, do those difficulties throw light upon the proper construction to be given to the Act of 1922, s. 14, while it still remains unrepealed and unamended.

I agree, therefore, that this appeal ought to be dismissed.

Appeal dismissed.

Solicitors for the appellant : *Amery-Parkes & Co.*

Solicitors for the respondent : *Smith, Rundell, Dods & Bockett, for Cecil Brown, Town Clerk, Cardiff.*

F. P. F.

McCALL BROTHERS, LIMITED *v.* HARGREAVES.

1932
May 2, 4, 11.

[1931. M. 2934.]

SAME *v.* SAME (CONSOLIDATED).

[1931. M. 2988.]

Bill of Exchange—Bill to Order of Drawer—Indorsement as Security—Indorsement by Third Party in case of default by Acceptor—Subsequent Indorsement by Drawer—Drawer's Indorsement beneath that of Third Party—Verbal Agreement by Third Party to be responsible to Drawer—Drawer's Authority to complete Bill by Indorsement—Statute of Frauds, 1677 (29 *Car.* 2, *c.* 3), *s.* 4—*Bills of Exchange Act,* 1882 (45 *&* 46 *Vict. c.* 61), *s.* 20.

Bills of exchange drawn by the plaintiffs to their own order, on and accepted by W. S. & Co., a company of which the defendant was a director, were indorsed by the defendant in pursuance of a verbal agreement under which the plaintiffs sold and delivered goods to the acceptors, in consideration of the defendant indorsing the bills with the intention of making himself liable to the plaintiffs in case of default by the acceptors. The plaintiffs subsequently indorsed the bills, writing their name underneath that of the defendant. The plaintiffs sued the defendant as indorser:—

Held (applying *McDonald (Gerald) & Co.* v. *Nash & Co.* [1924] A. C. 625; and *National Sales Corporation, Ld.* v. *Bernardi* [1931] 2 K. B. 188), that, by virtue of s. 20 of the Bills of Exchange Act, 1882, the plaintiffs had authority to complete the bills by adding their own indorsement, and that the fact that the plaintiffs wrote their name underneath, instead of above, that of the defendant, was no answer to the plaintiffs' claim.

Held, also, that although the verbal contract found to have been made between the defendant and the plaintiffs was in one sense a contract of guarantee, the Statute of Frauds could not be set up as an answer to a claim under the bills.

Singer v. *Elliott* (1888) 4 Times L. R. 524 criticized; *Shaw & Co.* v. *Holland* [1913] 2 K. B. 15 explained.

CONSOLIDATED ACTIONS tried by Goddard J. without a jury.

The plaintiffs were cloth manufacturers carrying on business at Trowbridge. In February, 1931, they were owed a considerable sum of money by Wain, Shiell & Co., Ld., for cloth supplied. There was more cloth awaiting delivery, but the plaintiffs were unwilling to deliver unless their overdue account was paid or secured and provision made for payment for the future deliveries. The defendant had recently become a director of Wain, Shiell & Co., Ld., and held a debenture over their assets. He appeared to be the director directly in charge of the finances of the company, and was trying to extricate it from its difficulties. A meeting took place on February 19, 1931, in London, at which were present Mr. Hammond, the plaintiffs' managing director, Mr. Armitage their London representative, the defendant, and Mr. Shiell, and the position was discussed. It was suggested that bills should be given both for the amount owing by the company and also in respect of any future deliveries, but Mr. Hammond was not willing to accept the company's bills unless they were backed by the defendant. Mr. Hammond asked the latter "to guarantee the bills," and at first he refused to do so. The defendant said at the trial that all he agreed to do was to indorse the bills so that the plaintiffs might discount them or otherwise raise money on them, but that he entirely refused to make himself in any way liable to the plaintiffs either for the past or future indebtedness. Goddard J. was, however, satisfied that Mr. Hammond refused to take the bills or to make any further deliveries unless the defendant would agree to make himself responsible to the plaintiffs on the bills, and that the defendant in the end did agree to do so. His Lordship accepted the evidence of Mr. Hammond and Mr. Armitage in preference to that of the defendant with regard to what took place at the meeting. Mr. Shiell was not called, and his Lordship found that the defendant did agree to indorse the bills with the intention of making himself liable thereon to the plaintiffs. The bills, nine in number, were drawn by the plaintiffs. They were accepted by the company, and when delivered the next day to the plaintiffs were found to lack the defendant's indorsement. Mr. Armitage took them back to the defendant before they had been indorsed by the plaintiffs. The defendant then wrote his name on the back of the bills, and the plaintiffs subsequently indorsed them, writing their name underneath and not above that of the defendant.

The plaintiffs, as holders, sued the defendant, as indorser of two of the above bills of exchange each for 300*l*.

The indorsement of the writ alleged that the defendant indorsed the bills pursuant to a verbal agreement whereby the plaintiffs agreed to sell and deliver goods to the company in consideration of the defendant indorsing the bills without recourse against the plaintiffs as drawers. Various defences were pleaded, among them being that there was no notice of dishonour, which was abandoned at the trial, and those that were insisted on may be summarized as follows: (1.) That the defendant indorsed the bills only to enable the plaintiffs to discount them and not with the intention of making himself liable to the drawers; (2.) that an indorser was not liable to the drawer unless an agreement was proved whereby he undertook to be liable, and that such an agreement was neither pleaded nor proved; (3.) that to any such agreement the Statute of Frauds would be an answer, there being no written memorandum of such an agreement; (4.) that the plaintiffs had no authority to complete the bills in the way in which they were completed, and that as the bills had never been negotiated to the plaintiffs the defendant was not liable to them, or, if he was, he had a right over of indemnity against them.

Cartwright Sharp for the plaintiffs.

Gerald Gardiner for the defendant. The plaintiffs cannot recover against the defendant. They had no authority to indorse the bills as they did. The bills were indorsed in the wrong order, and as there has been no negotiation of the bills the defendant is not liable: see *Shaw & Co.* v. *Holland.* (1) The agreement made between the defendant and the plaintiffs was in effect an agreement by the defendant that he would pay the drawers if the acceptors failed to do so, and that amounted to an agreement of guarantee. In the absence of a written memorandum to satisfy s. 4 of the Statute of Frauds such an agreement cannot be proved. The Statute of Frauds was not pleaded in *McDonald (Gerald) & Co.* v. *Nash & Co.* (2), nor in *National Sales Corporation, Ld.* v. *Bernardi.* (3) See also *Steele* v. *M'Kinlay* (4); *Singer* v.

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(1) [1913] 2 K. B. 15.
(2) [1924] A. C. 625.
(3) [1931] 2 K. B. 188.
(4) (1880) 5 App. Cas. 754.

Elliott (1); *Jenkins & Sons* v. *Coomber* (2); and *In re Gooch. Ex parte Judd.* (3)

Cartwright Sharp in reply. The true effect of the transaction is that the defendant undertook all the liabilities of an indorser and agreed that he would not have recourse against the drawers. The plaintiffs are entitled to recover.

[*Wilkinson* v. *Unwin* (4) and *Glenie* v. *Bruce Smith* (5) were also referred to.]

Cur. adv. vult.

May 11. Goddard J. [read a judgment, in which he stated the facts, and said:] I deal first with the points submitted by Mr. Gardiner with regard to the plaintiffs' lack of authority to indorse the bills as they did. He based his argument on the fact that the bills were indorsed by the plaintiffs after they were indorsed by the defendant and in the wrong order, and while I understood him to admit that this would be no answer if the bills had been negotiated, he contended that, as there had been no negotiation, the plaintiffs could not recover. He relied particularly on *Shaw & Co.* v. *Holland* (6), in which the facts were similar to the present. In my opinion, however, these contentions are now disposed of by the decision of the House of Lords in *McDonald* (*Gerald*) *& Co.* v. *Nash & Co.* (7), and of Wright J., as he then was, in *National Sales Corporation, Ld.* v. *Bernardi* (8), in which all the cases on this point were reviewed.

Mr. Gardiner has pointed out that in *McDonald* (*Gerald*) *& Co.* v. *Nash & Co.* (7) there was apparently some misapprehension in the mind of the Lord Chancellor, who delivered the leading opinion, with regard to the facts found in *Shaw & Co.* v. *Holland* (6), but the decision of the House was that where an agreement is proved of the same nature and effect as I have found proved in this case, the drawers have authority under s. 20 of the Bills of Exchange Act, 1882, to complete the bills by adding their indorsement. In that case the drawers' indorsement was written above that of the defendant indorser, and not, as here, below; but in *National Sales Corporation, Ld.* v. *Bernardi* (1) Wright J. held that the order of the indorsements was immaterial, and he regarded *Shaw & Co.* v. *Holland* (2) as overruled by *McDonald (Gerald) & Co.* v. *Nash & Co.* (3) I respectfully agree with this decision. I think it is clear that *Shaw & Co.* v. *Holland* (2) depended on the fact that the Court refused to find that the drawers in that case had authority under s. 20 to do that which the House of Lords held in *McDonald (Gerald) & Co.* v. *Nash & Co.* (3) that there was authority to do under that section. That authority may be limited by circumstances that may be proved (see per Lord Sumner (4)), but I find no such circumstances here, or, indeed, anything to distinguish this case from either of the decisions to which I have referred. Therefore these points fail.

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(1) 4 Times L. R. 524.
(2) [1898] 2 Q. B. 168.
(3) [1921] 2 K. B. 593.
(4) (1881) 7 Q. B. D. 636.
(5) [1907] 2 K. B. 507; affirmed in C. A. [1908] 1 K. B. 263.
(6) [1913] 2 K. B. 15.
(7) [1924] A. C. 625.
(8) [1931] 2 K. B. 188.

It remains to deal with the defence of the Statute of Frauds. The way it is put is that the agreement come to on February 19 was in effect an agreement by the defendant that he would pay the drawers if the acceptors failed to do so; that he was therefore a guarantor for the acceptors; and that in the absence of a written memorandum the agreement cannot be proved. Mr. Gardiner contends that while the decision in both *McDonald (Gerald) & Co.* v. *Nash & Co.* (3) and *National Sales Corporation, Ld.* v. *Bernardi* (1) depends on the fact that there was such an agreement as I have found to exist here, in neither of those cases had the Statute of Frauds been pleaded or relied upon. I have on inquiry ascertained that the reports are quite accurate in this respect, that in fact in neither case was the Statute pleaded.

Several cases were referred to which at first sight do seem to support the argument, but when carefully read I think that it is clear that they do not. The foundation of

(1) [1931] 2 K. B. 188.
(2) [1913] 2 K. B. 15.
(3) [1924] A. C. 625.
(4) Ibid. 625, 648.

the argument is laid in *Steele* v. *M'Kinlay* (1), and there are passages in the speeches of both Lord Blackburn and Lord Watson which do seem to afford support to this contention; but it is to be observed that in that case there was no evidence at all with regard to the agreement under which the deceased indorser wrote his name on the bills, and in *Wilkinson* v. *Unwin* (2) the Court of Appeal held that where bills are indorsed, as here, with the intention that the indorser is to become liable to the drawer on the bills, the absence of a written agreement affords no defence. Perhaps the matter may be stated thus: In *Steele* v. *M'Kinlay* (1) there was no evidence of an agreement by the indorser to be liable on the bill to the drawer, and the House of Lords refused to find an agreement outside the bill itself which would be an agreement of guarantee. In the absence of any evidence on the subject, they were not prepared to find that the indorser had undertaken any liability on the bill other than that which the law merchant ordinarily imposes on an indorser; but in *Wilkinson* v. *Unwin* (2) there was evidence, and the Court of Appeal held that the indorser had undertaken a liability on the bill to the drawer, and that the latter was entitled to sue on the bill and not on a contract of guarantee. The Court expressly held that *Steele* v. *M'Kinlay* (1) did not oblige them to hold to the contrary.

The next case is *Singer* v. *Elliott* (3), in which it does seem that the Court of Appeal would have held that the Statute was an answer, had it not been that they were able to find that there was a written agreement. It does not appear that *Wilkinson* v. *Unwin* (2) was cited in that case, or that the attention of the Court was called to s. 20, and in view of the more recent decisions on the point I do not think that that case can now be regarded as an authority.

The next case which appears to favour the defendant is *Jenkins & Sons* v. *Coomber*. (4) In that case it was held that the bill was irregular since the indorser put his name on it before the drawer had indorsed it. That part of the

(1) 5 App. Cas. 754.
(2) 7 Q. B. D. 636.
(3) 4 Times L. R. 524.
(4) [1898] 2 Q. B. 168.

decision is now clearly overruled by *McDonald (Gerald) & Co.* v. *Nash & Co.* (1) and *National Sales Corporation, Ld.* v. *Bernardi.* (2) But the Court having decided that the plaintiffs could not sue on the bill also held that they could not sue on the agreement by the defendant to guarantee payment, because of the absence of a memorandum. They were treating the cause of action on the bill and on the agreement as separate or alternative. Having held that the bill was bad as a bill they refused to hold that it constituted a memorandum sufficient to satisfy the Statute. This also, in my judgment, is the explanation of the decision in *Shaw & Co.* v. *Holland.* (3) There again the cause of action was stated alternatively, on a bill and on a contract of guarantee. For reasons which were given by Wright J. in *National Sales Corporation, Ld.* v. *Bernardi* (2), the decision that the plaintiffs could not sue on the bill must be treated as overruled; but it is, in my opinion, clear that when Hamilton J., as he then was, dealt with the Statute of Frauds in *Shaw & Co.* v. *Holland* (4), he was considering the liability not on the bill, but upon the alternative cause of action on the verbal agreement.

The only other case that it is necessary to mention is *In re Gooch. Ex parte Judd.* (5) As it was a motion in bankruptcy there were no pleadings, but it appears from the report that a point was taken under the Statute in the argument, though it is not noticed in the judgment. The reason is that here again it was argued that there was no remedy on the bill because it was bad, and no remedy outside it because of the Statute. As the Court rejected the argument that the bill was bad, it was unnecessary to deal with the alternative question. It would, I am sure, astonish most people to be told that the Statute of Frauds could ever be set up as an answer to a claim under a bill, and I am glad to find that there is nothing in the authorities which obliges me so to hold. It is true, no doubt, that the agreement which has been found to exist in all the cases cited, as well as in this case, is in one sense a contract of guarantee; but none the less an action will lie on the bill against a person who has indorsed it in these circumstances and with the intention I have found. The bills must be regarded as indorsed by the plaintiffs to the defendant and re-indorsed by him to them: see *Glenie* v. *Bruce Smith.* (1)

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(1) [1924] A. C. 625.

(2) [1931] 2 K. B. 188.

(3) [1913] 2 K. B. 15.

(4) Ibid. 15, 19.

(5) [1921] 2 K. B. 593.

I think that Mr. Cartwright Sharp's argument that the true effect is that the third party undertakes all the liabilities of an indorser and agrees that he will not have recourse against the drawer, who is also the holder, is right. This would also dispose of the question of pleading raised by Mr. Gardiner, though in any case I think the amended statement of claim in this case is enough.

There will be judgment for the plaintiffs for 600*l.* in the consolidated actions with interest to date which must be calculated, and for the noting charges with costs.

Judgment for plaintiffs.

Solicitors for the plaintiffs: *Robins, Hay & Waters, for Mann, Rodway & Green, Trowbridge.*

Solicitors for the defendant: *Keen, Rogers & Co., for Reginald Hartley, Royston.*

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(1) [1907] 2 K. B. 507; affirmed in C. A. [1908] 1 K. B. 263.

T. W. M.

CHAPMAN *v.* LORD ELLESMERE AND OTHERS.

C. A.
1932
Feb. 22, 23, 24, 25 ;
March 22.

[1930. C. 4078.]

Defamation—Libel—Decision of Domestic Tribunal—Publication of Decision in Periodical selected by Parties—Innuendo—Absence of Malice—Privilege —Volenti non fit injuria—Publication of Decision in Press—No Privilege —Damages.

By rule 17 of the Rules of Racing of the Jockey Club : "The Stewards of the Jockey Club have power, at their discretion, to grant, and to withdraw, licences to officials, trainers, jockeys, and racecourses ; to refuse to allow any person to act or continue as an authorised agent ; to fix the dates on which all meetings shall be held ; to make enquiry into and deal with any matters relating to racing, and to warn any person off Newmarket Heath ; and to authorise the publication in the Racing Calendar of their decisions respecting any of the above matters."

The plaintiff, who was a horse trainer, received from the stewards of the Jockey Club a trainer's licence to train horses to run under the Rules of Racing during the year 1930. The licence was expressed to be subject to conditions, condition 3 of which provided that a trainer's licence might be withdrawn or suspended by the stewards of the Jockey Club in their absolute discretion, and such withdrawal or suspension might be published in the Racing Calendar, the recognized organ of the Jockey Club, for any reason which might seem proper to them, and that the stewards should not be bound to state their reasons.

The plaintiff trained a horse which ran in a race at a meeting held under the Rules of the Jockey Club. After the race the acting stewards of the meeting ordered an examination of the horse, and on receiving a report of that examination they referred the matter to the stewards of the Jockey Club. The stewards held an inquiry, and their decision was communicated by the Club's agents to the Press agencies and the Times, and was published by them. It was also published in the Racing Calendar. The decision contained the following statement : "The stewards of the Jockey Club . . . . after further investigation, satisfied themselves that a drug had been administered to the horse for the purpose of the race in question. They disqualified the horse for this race and for all future races under their rules and warned C. C. Chapman the trainer of the horse off Newmarket Heath."

In an action by the trainer against the stewards, their agents and the Times Publishing Company, the proprietors of the Times, for libel, Horridge J., after holding that there was no evidence of malice, left questions to the jury which they answered to the effect that this statement was not true in the natural meaning of the words but meant that the plaintiff was a party to the actual doping of the horse, and they fixed the damages at 10,000*l*., 3000*l*. and 3000*l*. in respect of the publication in the Racing Calendar, to the news agencies and in the

Times respectively. Judgment was accordingly entered for 13,000*l.* against the stewards and their agents for publication in the Racing Calendar and to the news agencies, and 3000*l.* against the stewards, their agents, and the Times Publishing Company for publication in the Times.

On appeal:—

Held, (1.) that in finding that the words published were not true in their natural meaning, the jury must have meant that the statement, which was literally true, involved an untrue innuendo which was defamatory.

(2.) that the publication of the decision of a domestic tribunal in the terms in which the tribunal bona fide embodied it, in the publication chosen by the parties as the means of communication between the tribunal and the section of the public interested, was privileged.

(3.) that the publication in the Racing Calendar of the stewards' decision was therefore privileged, and, as the plaintiff had agreed to publication in that periodical of the stewards' decision, it was immaterial that the jury put a meaning on the words in which it was bona fide embodied by the stewards different from that which was intended by them.

(4.) that Horridge J. was right in holding that there was no evidence of malice, and the action in regard to the privileged publication in the Racing Calendar therefore failed.

(5.) that the publication to the news agencies and in the Times was not privileged, but the damages awarded both in respect of these publications as well as in respect of the publication in the Racing Calendar were excessive.

(6.) that there must in regard to the claims in respect of the publication to the news agencies and in the Times be a new trial, which ought not in all the circumstances to be limited to the question of damages, but to go also to the question whether there had been a libel.

Per Slesser L.J.: (1.) As publication of the stewards' decision in the Racing Calendar was assented to by the plaintiff and the publication was in fact a true statement of their decision, the principle of volenti non fit injuria applied, and no claim for damages in respect of that publication would lie. The fact that the decision was published in such a way as to give rise to a defamatory innuendo was a risk which the plaintiff, by consenting to a report of the decision being published in the Racing Calendar, had elected to run.

(2.) In assessing damages against joint tortfeasors one set of damages will be fixed, and they must be assessed according to the aggregate amount of the injury resulting from the common act.

Clark v. *Newsam* (1847) 1 Ex. 131, 140 applied.

Maxwell v. *Keun*, Times Newsp., February 3, 1928, followed.

Per Romer L.J.: The privilege given by the common law to reports of proceedings before a Court of justice open to the public does not extend to a proceeding before a domestic tribunal, such as the stewards of the Jockey Club, at which the public are not entitled to be present.

Obiter dicta of Greer L.J. on this point in *Cookson* v. *Harewood* (see Note post, p. 478) dissented from so far as they are to the contrary.

APPEAL from the judgment of Horridge J. in an action tried before the learned judge with a special jury.

The following statement of facts is taken from the considered judgment of the Master of the Rolls. The plaintiff, Charles Chapman, at the time material to the incidents hereinafter related, was a trainer of racehorses at Lavant near Chichester. Among the horses under his care in his stable was one named "Don Pat" belonging to Mr. C. B. Rowe, which ran in a race for, and succeeded in winning, the Bedfont Plate High Weight Handicap at a race meeting held at Kempton Park, Middlesex, on August 13, 1930. The running of the horse on that occasion attracted the attention of the stewards of the meeting, who ordered, under rule 14 of the rules hereinafter mentioned, an examination of the horse to be made, and adequate specimens were taken of the horse's saliva and sweat, and these were sent for examination by Dr. Lander, the specialist who makes examinations of such exhibits for the Jockey Club. Upon applying the usual chemical analysis and tests, Dr. Lander found that the horse had been drugged, or "doped," with a stimulant known as caffein, and that a fairly big dose had been administered. The Kempton Park stewards held a preliminary investigation on September 13, and Dr. Lander was called before them and gave evidence as above, and after hearing the evidence of the persons who took the swabs, in addition to that of the owner and trainer, they decided that a case had been made out for the consideration of the stewards of the Jockey Club and sent the case accordingly to that body.

The stewards of the Jockey Club sat to hear the case in London on September 29, and the three defendants—Lords Rosebery, Harewood and Ellesmere—were the stewards before whom it came, Lord Rosebery acting as chairman. The case was fully investigated. The plaintiff gave evidence and called several witnesses, including those who looked after "Don Pat," and those who were responsible for the transit of the horse to Kempton Park. The plaintiff was present throughout the inquiry; after which the stewards considered their decision and the words in which it was to be expressed. The terms of their decision were as follows: "The stewards of the Jockey Club (Lord Ellesmere acting for Lord Zetland) after further investigation, satisfied themselves that a drug had been administered to the horse for the purpose of the race in question. They disqualified the horse for this race, and for all future races under their Rules, and warned C. Chapman, the trainer of the horse, off Newmarket Heath."

Kempton Park is licensed for racing under rule 41 (*a*) of the Rules of Racing; and the Rules and Orders of the Jockey Club, which it is agreed apply to the racing there held, are binding upon all those who take part in it. Rule 66 declares the various disqualifications of horses from racing, and by the last clause: "Any horse which has been the subject of fraudulent practice may, at the discretion of the Stewards of the Jockey Club, be disqualified for such time and for such races as they shall determine." Further, by the same rule, no horse is qualified to run unless trained by a licensed trainer, and the horse is also disqualified if and so long as he is in the stable of, or under the care and management of, a disqualified person, after such disqualification of such person has been twice published in the Racing Calendar. Rule 176 prohibits the administration of drugs or stimulants to a horse by any method, and imposes a penalty for such an offence. By rule 102 every trainer of a horse running under the rules must obtain an annual licence from the stewards of the Jockey Club. The plaintiff's licence was issued to him on March 13, 1930. It is made subject to the Rules of Racing for the time being, and clause 3 of it is as follows: "A trainer's licence may be withdrawn or suspended by the Stewards of the Jockey Club in their absolute discretion, and such withdrawal or suspension may be published in the Racing Calendar, for any reason which may seem proper to them, and they shall not be bound to state their reasons." A trainer is thus submitted to the jurisdiction and decision of the stewards.

It is not in doubt that "Don Pat" was drugged when he ran his race for the Bedfont Plate, and that this corrupt act brought the matter within the jurisdiction of the stewards of the Jockey Club, and that it was part of their duty to investigate and decide what should be done in the matter. The best evidence that the inquiry was held fairly and of the responsibility of the trainer in respect of a horse found to have been doped is to be found in the evidence of the plaintiff recorded by the learned judge: "I am as a trainer of horses absolutely responsible to the stewards of the Jockey Club. As to any horse under my care I should be the person from whom the stewards would require an explanation. I should regard myself as responsible to the stewards for all horses in my training. I take it for granted and fully believe that 'Don Pat' was doped and heavily doped. Doping is a very serious fraud on all race-goers. Very serious fraud on the owners of other horses and to the horses themselves. Absolutely very seriously damaging to the sport of horse racing. The authorities should take every step to stamp out doping from races. I was treated by the stewards with every courtesy. My witnesses were called and examined by the stewards and I did not fully appreciate what I could ask them. Every opportunity was given me to call witnesses I desired. I was asked on one or two occasions if I had anything more to say. I think the stewards wished to give me every opportunity of dealing with every part of the case. . . . . . I had every opportunity of elucidating the points I wished to make. I was never stopped. I had a patient and fair hearing of all the matters I desired to put forward. . . . . There was a publication in the Racing Calendar. I should say definitely, yes, that the Racing Calendar circulates mostly among racing people. That is as far as I know the publication in which the decisions of the Jockey Club are printed." The chairman gave evidence that in coming to their decision they acted as a judicial body upon the evidence laid before them. The terms of their decision as stated orally to the plaintiff vary slightly from the terms entered in the record, but the three stewards said that the final words were chosen as being more favourable to the plaintiff—the earlier words used:—" We consider you as trainer were directly responsible for the care of the horse"—seeming to indicate a closer personal responsibility upon the plaintiff than the latter; whereas the reference to the plaintiff, simpliciter, as trainer, was said to indicate that it was as trainer that the sentence fell upon him.

After this decision had been reached and communicated to the plaintiff, the defendants, Weatherby & Sons, in the ordinary course of their routine as agents for the Jockey Club, communicated the decision in its full terms, as well as an account of its origin from the action of the Kempton Park stewards, and the reference by them to the stewards of the Jockey Club, to the news agencies, who circulated it as a matter of public interest to the newspapers, with the consequence that the defendants, the Times Publishing Company, Ld., published the information in the issue of the Times on September 30 as an announcement "from our Racing Correspondent." The full terms that appeared in the paper are set out in the statement of claim.

On October 2, the Racing Calendar, for the publication of which the responsibility is attached to Messrs. Weatherby and the three stewards, who are defendants, published under a heading "Jockey Club Notices" the decision of the stewards as above stated. The publication in the Times and in the Racing Calendar was not otherwise than in a form which correctly related the matter before the stewards of the Jockey Club and the terms of their actual decision thereon. On October 16, 1930, the plaintiff issued his writ against the five defendants, claiming damages for libel. In the statement of claim the responsibility, as now material, is distributed as follows: The defendants, the Earls of Rosebery, Harewood and Ellesmere, are sued as stewards of the Jockey Club, which Club is the proprietor of the Racing Calendar; Messrs. Weatherby as printers and publishers of the Racing Calendar; the Times Publishing Company, Ld., as proprietors, printers and publishers of the Times.

In para. 3 of the statement of claim the complaint is of the issue to and publication by the defendants, other than the Times Publishing Company, Ld., of the stewards' decision to the Press agencies.

In para. 4 all the defendants are charged with responsibility for the publication in the Times on September 30.

In para. 5 the defendants, other than the Times Publishing Company, Ld., are charged with responsibility for the announcement in the Racing Calendar on October 2.

The innuendo alleged was that the words complained of meant, and were understood to mean, that the plaintiff had administered or caused to be administered a drug to " Don Pat " and had been guilty of the criminal offence of cruelty to the horse, and was unfit to be a trainer of racehorses and had acted dishonestly and was guilty of some corrupt practice. Each one of these charges is serious in itself, and necessarily of deep importance to the plaintiff as a trainer of racehorses. It will be observed that no suggestion is made of contesting the decision of the stewards of the Jockey Club. That remains unchallenged.

Rule 17 of the Rules of Racing is as follows: " The Stewards of the Jockey Club have power, at their discretion, to grant, and to withdraw, licences to officials, trainers, jockeys, and racecourses; to refuse to allow any person to act or continue as an authorised agent; to fix the dates on which all meetings shall be held; to make enquiry into, and deal with, any matters relating to racing; and to warn any person off Newmarket Heath; and to authorise the publication in the Racing Calendar of the decisions respecting any of the above matters." That rule, to which must be added clause 3 of the conditions under which the plaintiff held his licence as a trainer, rendered the decision itself of the stewards beyond challenge, for it was given judicially, as the plaintiff himself says, upon a matter of grave importance to racing, after the plaintiff had had a patient and fair hearing. No charge of improper conduct is made against the stewards. The charge is as to the terms in which their decision was framed, which it is claimed left it open for an innuendo to be placed upon it, and a deduction to be drawn, that it intended to convey a charge that the plaintiff had himself administered the drug or dope to the horse, and complaint is made of the fact that it was not expressly stated that no personal charge was made against the plaintiff. All the three stewards were called. They repudiated this intention and meaning. They said they had no feeling of any kind against the plaintiff. They said they had not thought that he administered the drug, and affirmed that they had used the words "the trainer of the horse" for the purpose of showing that their decision related to him as trainer and responsible as such—no less and no more.

The defendants, the three stewards and Messrs. Weatherby, in their defence admitted the three publications by them, pleaded privilege relating to a matter of public interest to the public, who had a common interest with them; further that a special privilege attached to the publication in the Racing Calendar, under the terms of rule 17 above and clause 3 of the trainer's licence, and also that the words published, without the innuendo, were true.

The Times Publishing Company pleaded that the words as published, without any innuendo, were true, and relied upon the privilege arising from the matter being one of public interest.

The learned judge at the trial decided to let all the evidence be concluded before he ruled upon the points of law submitted to him. He then held that the occasions of the publications complained of in paras. 3, 4 and 5 of the statement of claim were none of them privileged. He held that there was no evidence of malice, and he asked the following questions of the jury, to which their answers are now added: "1. Are the words set out in paras. 3 and 5 of the statement of claim true in their natural meaning?—No. 2. Do these words mean that the plaintiff was a party to the actual doping of 'Don Pat'?—Yes. 3. Are the words set out in para. 4 true in their natural meaning?—No. 4. Do those words mean that the plaintiff was a party to the actual doping of 'Don Pat'?—Yes. 5. Damages under para. 3 — 3000*l.* 6. Damages under para. 4 — 3000*l.* 7. Damages under para. 5—10,000*l.*" Thereupon he entered judgment against the three stewards and Messrs. Weatherby for 13,000*l*. and against the Times Publishing Company and the other defendants for the further sum of 3000*l*. All the defendants appeal, the Times Publishing Company being separately represented.

The appeal was heard on February 22, 23, 24 and 25, 1932.

Norman Birkett K.C., *Geoffrey Lawrence K.C.*, and *Harold Murphy* for the stewards of the Jockey Club and Messrs. Weatherby. Under rule 176 (1.) of the Rules of Racing a number of offences are specified, the first of which is that of any person administering or causing to be administered, "for the purpose of affecting the speed of a horse, drugs or stimulants internally by hypodermic or other methods"; and the rule provides that every person so offending shall be warned off Newmarket Heath and other places where the rules are in force. Under rule 102 (1.) every trainer of a horse running under those rules must obtain an annual licence from the stewards of the Jockey Club. The plaintiff held such a licence. It was made subject to the Rules of Racing, and there was a provision in the licence (clause 3) enabling the stewards to withdraw or suspend the licence and publish such withdrawal or suspension in the Racing Calendar. By rule 17 of the Rules of Racing: "The Stewards of the Jockey Club have power, at their discretion, to grant, and to withdraw, licences to officials, trainers, jockeys, and racecourses . . . . to make enquiry into, and deal with, any matters relating to racing; and to warn any person off Newmarket Heath; and to authorise the publication in the Racing Calendar of their decisions. . . . ."

Here the horse was disqualified under rule 66, and under rule 17 the stewards warned the plaintiff off Newmarket Heath.

The main grounds of appeal in this case are: (1.) That at the end of the plaintiff's case the judge should have withdrawn the case from the jury and directed judgment to be entered for the defendants on the ground that having regard to the nature of the alleged libel, no question as to an innuendo arose in that the truth of the alleged libel, apart from the alleged innuendo, had been admitted. (2.) That the judge, after ruling that there was no evidence of malice in any of the defendants, should have withdrawn the case from the jury and directed judgment for the defendants on the ground that the publications complained of were privileged. (3.) That the judge was wrong in refusing to rule that the publication of the alleged libel in the Racing Calendar was privileged. (4.) That the judge was wrong in refusing to rule that the plaintiff, being bound by the rules of the Rules of Racing, could not be heard to complain of the publication in the Racing Calendar. (5.) That the damages awarded in respect of (1.) publication of the alleged libel to the Press Association, Ld., the Central News, Ld., and the Exchange Telegraph Co., Ld.; (2.) publication in the Times; and (3.) publication in the Racing Calendar were excessive.

Having regard to rule 17 of the Rules of Racing, by which the plaintiff was bound, the defendants were entitled to publish the statement in the Racing Calendar, and no question of innuendo arose. The notice was true as a plain record of what happened. It is the words "and they warned C. Chapman, the trainer of the horse, off Newmarket Heath" which are said to give rise to the innuendo. Rule 17 of the Rules of Racing gave authority to the stewards to publish their decisions in the Racing Calendar, and the plaintiff is bound by that rule. In these circumstances an innuendo cannot be read into the publication so as to prevent the stewards from having the protection of the rule: *Cookson* v. *Harewood*. (1) In *Hope* v. *I'Anson* (2) there was no rule corresponding to rule 17 in the present case authorizing publication and thus avoiding the necessity of proving express consent. Publication of any decision of the stewards was authorized so long as the stewards exercised their power bona fide. There is no suggestion that they did not do so in the present case. So long as a statement is true the question what the jury may think about it is immaterial.

Further the judge ought to have held that the publication was made on a privileged occasion. If the matter is of public interest, and the party who publishes it owes a duty to communicate it to the public, the publication is privileged: per Buckley L.J. in *Adam* v. *Ward.* (1) The publication in the Racing Calendar was privileged because of the widespread interest in horse racing and of the duty of the Jockey Club to keep the sport pure.

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(1) See Note post, p. 478.

(2) (1901) 18 Times L. R. 201.

[LORD HANWORTH M.R. referred to *Stuart* v. *Bell.* (2)]

The judge ought to have held as to all the three publications that the occasion was privileged.

Then as to the last point—namely, damages—it is submitted that the award of 16,000*l.* in the circumstances was so excessive that it ought not to stand. The jury have in effect said that the plaintiff ought not to have been warned off the turf. That was an issue with which they had no concern. The plaintiff's means of livelihood went when the stewards warned him off the course. The damages for publication were therefore excessive on every head. If the Court is against these defendants on the question of the publication in the Racing Calendar being privileged, then it is submitted that as the jury have taken into consideration matters with which they had no concern there ought to be a new trial.

Though the plaintiff's counsel has said that he did not rely much upon the statement in the Racing Calendar, yet the jury have said they did, and have awarded 10,000*l.* in respect of it. If therefore the jury estimated those damages at too high a sum, how can reliance be placed on the amount of the sums awarded in respect of the other items? No reasonable jury could have awarded 3000*l.* on para. 3 or para. 5 of the statement of claim.

[They also referred to *Brown* v. *Croome* (3); *Dawkins* v. *Antrobus* (4); *Maclean* v. *Workers' Union* (5); *Wright* v. *Woodgate* (6); *Toogood* v. *Spyring* (7); Gatley on Libel and Slander, 2nd ed., p. 297.]

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(1) (1915) 31 Times L. R. 299, 304.
(2) [1891] 2 Q. B. 341.
(3) (1817) 2 Stark. 297, 301.
(4) (1881) 17 Ch. D. 615, 626.
(5) [1929] 1 Ch. 602.
(6) (1835) 2 C. M. & R. 573.
(7) (1834) 1 C. M. & R. 181.

C. A.
1932

CHAPMAN
v.
ELLESMERE
(LORD).

Stuart Bevan K.C., *Wilfrid Lewis*, and *J. P. Ashworth* for the defendants, the Times Publishing Company. The Times stated that the stewards of the Jockey Club had come to a certain decision, and that decision was repeated in the terms in which it was published by the stewards. So far as the Times was concerned it mattered not whether or not the language of the stewards accurately represented their findings. A statement was handed out by them as their decision, and, if it did not accurately formulate that decision, the Times had no reason to suppose that it was anything other than what the stewards stated it to be—namely, the decision to which they had come. In those circumstances the publication in the Times of the stewards' decision was privileged. It was a publication relating to a matter of public interest, for it was of interest to a substantial section of the public. If this were not the proper test a newspaper would never obtain protection. Here that test is satisfied. It is not only on a plea of fair comment that it is material to show that the publication was in regard to a matter of public interest.

In *Hope* v. *I'Anson* (1) there was no plea of fair comment, but one of privilege, and yet the question of public interest was discussed. It is true that the racing news was there held not to be of public interest. In the present case evidence was called to show that information as to racing has become in these days a matter of great general public interest; and that in that respect the position has changed since the decision in *Hope* v. *I'Anson.* (1) In that case a very different matter was being dealt with—namely, an assault in the paddock. Can any one say that the Derby and all connected with it are not of public interest? It follows that this was a matter of public interest, and that as there was no malice the publication was privileged.

The decision of the stewards being of interest to the public, a duty was cast on the defendants, the Times Publishing Company, to publish it, and the case is covered by *Adam* v. *Ward* (2), where Buckley L.J. said: "The following proposition, I think, is true—that if the matter is matter of public interest, and the party who publishes it owes a duty to communicate it to the public, the publication is privileged."

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(1) 18 Times L. R. 201.

(2) 31 Times L. R. 299, 304.

Again, the damages awarded against the Times were excessive. The underlying motive of the jury in awarding 3000*l.* was, just as in the case of the damages of 10,000*l.*, to compensate the plaintiff for the loss of his livelihood as the result of the decision of the stewards. That is not a ground for assessing damages.

[ROMER L.J. If the published statement meant that the plaintiff had doped the horse, it might well be that it would prevent the plaintiff from earning his livelihood anywhere.]

The defendants have disclaimed any charge against the plaintiff involving him in doping. The jury did not direct their minds to the true measure of damages, and the Times Publishing Company, as well as the other defendants, are entitled to a new trial.

Sir Patrick Hastings K.C., *D. N. Pritt K.C.*, and *Harold Simmons* for the respondent. In the case of libel it is for the judge to decide whether the words are capable of a defamatory meaning. If he does not rule that they are not, it becomes a question of fact for the jury to decide whether the words used bear a particular defamatory meaning—in this case, the meaning that the plaintiff doped the horse "Don Pat." Neither of those propositions can be denied, and the judge found that the words used were capable of a defamatory meaning and the jury that the words used did mean that the plaintiff doped the horse.

On the general question of the publication to the news agencies and the Times, the only defence set up is that the publication was privileged. There can be no privilege, unless the occasion is one where a particular communication would be privileged and the communication is not too wide. Here, on the finding of the jury, the statement published was untrue. It is impossible to support a contention that publication to the world can be made of an untrue statement with regard to a person connected with some such matter as racing, tennis, or football, and that such a statement is privileged. There is no justification for such a contention: Gatley on Libel and Slander, 2nd ed., p. 274.

There are only two cases in which publication of such a statement was held to be privileged. The first is *Allbutt* v. *General Council of Medical Education and Registration* (1), where the General Council published in the minutes a statement that the name of the plaintiff had been removed from the register of medical practitioners; and the second is *Adam* v. *Ward* (2), where a letter was published vindicating a general in the Army against whom a false charge had been made by a member of Parliament in a speech delivered in the House of Commons, which was widely reported. Those cases depended on there being a duty to make the publication.

How can it be said that the Times had any duty to make the publication in question? It has never before been suggested that a self-established body, such as the stewards of the Jockey Club, have a duty to publish all over the world untrue statements about a person's character, so as to make the publications privileged. Publications to the world can only be justified where there is a national duty to publish, or where such a wide publication is necessary to vindicate a person against whom a libel had been made to which a like publicity had been given. There must be a duty commensurate with the extent of the publication.

[ROMER L.J. Might there not be a duty to communicate to so large a section of the public that it could only be effected through the Press?]

It is submitted not; but in any case no such duty existed here on the part of the stewards of the Jockey Club. Still less could the Times Publishing Co. have been under such a duty, nor can it assist them that they published nothing but a statement issued to them which purported to be an accurate account of the findings of the stewards. At common law the only protection to a person publishing the report of a semi-judicial body is when the proceedings were open to the public: see Gatley on Libel and Slander, 2nd ed.,

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(1) (1889) 23 Q. B. D. 400, 413.

(2) 31 Times L. R. 299.

p. 328; and the Law of Libel Amendment Act, 1888, s. 3, which admittedly does not help the Times.

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As regards the publication in the Racing Calendar, it has been contended that rule 17 of the Rules of Racing gave the stewards a contractual right to publish their decision in the Racing Calendar. The principle invoked is one applicable to every tort—namely, volenti non fit injuria. Here the plaintiff had only consented to publication of the real decision. Rule 17 can only assist the stewards where there has been a truthful publication, and the jury here have found that the statement published meant that the plaintiff had doped the horse. How can there be a legal answer under that rule to an action for defamation in such circumstances? Reliance has been placed on *Cookson* v. *Harewood.* (1) In that case the stewards had power to warn a person off the course in their absolute discretion without giving any reasons, and they exercised that power and gave no reasons, and published their decision in the Pony Turf Club Racing Calendar. All the judges of the Court of Appeal said that the statement published was true, and the stewards had a right under the Rules of Racing to publish a true statement of their decision. The principle volenti non fit injuria therefore applied. That was an entirely different case from the present, as the jury have found that the words used in the statement meant in their natural meaning something that was untrue.

The defendants have also raised the defence of privilege with regard to the publication in the Racing Calendar. There is, however, no distinction between the Racing Calendar and other newspapers. The extent of publication is merely a matter of degree. The test is whether the paper was available to a larger body of persons than those specially interested, and any one can buy the Racing Calendar. No Court has ever said that publication in a periodical available to the public is privileged except in the special circumstances that existed in *Allbutt's* case (2) and *Adam* v. *Ward.* (3)

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(1) See Note post, p. 478.
(2) 23 Q. B. D. 400.
(3) 31 Times L. R. 299.

Directly a publication is potentially available to the public it must be too wide to be treated as privileged: *Hope* v. *I'Anson.* (1) It has been argued that a larger part of the public is now interested in racing news; but even so, the principle of *Hope* v. *I'Anson* (1) applies. It cannot be said that substantially the whole of the public are interested, and the question is whether the publication was limited by being made to persons to whom there was a duty of publication: see *Brown* v. *Croome.* (2) No evidence has been given here to show that the only available mode of adequate publication was through a newspaper.

The only matter remaining to be dealt with is the question of damages. There is no question here as to a new trial in toto, because the other matters in question on the appeal are questions of law. The jury were entitled to increase the damages by reference to the conduct of the defendants throughout. Mr. Birkett has admitted that, if they had sought to justify the statement with the innuendo placed upon it, he could not have said that the damages were excessive. This case should be treated as if it were three different actions in which damages were awarded. It is impossible to argue that to give the plaintiff 3000*l.* damages for this awful libel was excessive. Therefore the damages for the publication in the news agencies and the Times of two sums of 3000*l.* cannot be treated as excessive.

As regards the damages of 10,000*l.* for the publication in the Racing Calendar, the jury awarded them because they intended to mark their view of the conduct of the stewards throughout by making the damages exemplary.

If the stewards, having issued the statement, had done their best to correct any misunderstanding arising from its wording, there would have been no ground for giving punitive damages. But when it is found that the stewards, believing that the publication of the statement was privileged, took no steps to correct the misunderstanding, different considerations apply. The stewards have suggested that they did their best to correct the misunderstanding, but that is not

(1) 18 Times L. R. 201.

(2) 2 Stark. 297.

supported by their statements in cross-examination. There would have been nothing inconsistent in the stewards making it clear to the public that the statement issued was not intended to bear the meaning put on it, seeing that in the pleadings in the action they were setting up the defence that the words of the statement in their natural meaning did not bear that meaning. Their failure to do so is a matter that the jury might well take into account in awarding damages.

[ROMER L.J. No evidence was given that the published statement had been widely misunderstood, although statements to that effect were made to the jury.]

The statements in the newspapers were put to the stewards before the judge ruled that they could not be referred to, unless the stewards admitted that they had read them. It was a complete surprise that they should deny having seen any of those papers. The suggestion made to the jury on behalf of the plaintiff was that the stewards were not frank in the matter. It is to be noted that, at the very time when Lord Rosebery was refusing the Duke of Richmond's request on behalf of the plaintiff that the stewards would correct any misunderstanding as to the meaning of the statement published, the stewards' defence was being amended by pleading that the words of the statement, in their natural meaning, did not mean that the plaintiff had doped "Don Pat."

There was, in the circumstances, good ground for asking the jury to give heavy damages. The jury have done so, and the damages awarded are not excessive.

[SLESSER L.J. The position of Messrs. Weatherby & Sons does not seem to have been taken into account. Even if the jury intended to award exemplary damages against the stewards, Messrs. Weatherby & Sons' position as joint tortfeasors should have been taken into account.]

The damages to be awarded were not affected by Messrs. Weatherby & Sons' innocence of any act that would lead the jury to give vindictive damages against them. The jury were entitled to award the damages required by the conduct of the stewards, and make both them and Messrs. Weatherby & Sons liable for them.

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Notice has been given to the defendants that it is intended to set up malice at the hearing of this appeal. The evidence of malice is exactly that evidence which has been relied on as a ground for giving exemplary damages. It is sufficient evidence of malice to show that an occasion which was privileged has been abused. Horridge J. was not justified in withdrawing the issue of malice from the jury, as there was evidence on which the jury could have found malice. It is only if this Court should hold with regard to any of the publications that they were privileged that it would be material to have the question of malice left open on a new trial.

Norman Birkett K.C. in reply. When there are joint defendants to a libel there can be only one judgment and assessment of damages against them; and when an improper action is attributed to one of two joint defendants which cannot be attributed to the other, the Court will not award damages against both on the ground of the improper action of the one: *Clark* v. *Newsam* (1); *Dawson* v. *M'Clelland* (2), and *Maxwell* v. *Keun.* (3)

It is difficult to understand why at the trial so much importance was attached to the cross-examination of the stewards with regard to two evening papers and a sporting newspaper. In the result the jury were inflamed against the stewards on quite inadequate grounds.

The rule laid down in *Toogood* v. *Spyring* (4) in the case of libel applies equally in the case of slander: *Brown* v. *Croome.* (5)

[He also referred to *Bowen-Rowlands* v. *Argus Press, Ld.* (6)]

Wilfrid Lewis replied for the defendants, the Times Publishing Co.

Cur. adv. vult.

March 22. The following written judgments were delivered:

LORD HANWORTH M.R. This appeal is from a judgment entered for the plaintiff by Horridge J. after a trial before him with a special jury. The appeal is presented on behalf of all the defendants and raises a number of points, some of which are particular to the respective defendants.

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(1) 1 Ex. 131.
(2) [1899] 2 I. R. 486, 490.
(3) Times Newsp., Feb. 2, 3, 1928.
(4) 1 C. M. & R. 181, 193.
(5) 2 Stark. 297, 301.
(6) Times Newsp., Feb. 10 and March 26, 1926.

The main facts are not in dispute. [His Lordship stated the facts as above set out, and, referring to the findings of the jury, continued :] I pause for a moment to consider the meaning of these findings of the jury. In saying that the words set out in paras. 3, 4 and 5 of the statement of claim are not true in their natural meaning, it is obvious that the jury regarded the statement that the trainer was warned off Newmarket Heath, which was, of course, literally true, as involving an innuendo ; the innuendo being, as appears from the answers themselves, that the plaintiff had been a party to the actual doping of "Don Pat." In this meaning the words were confessedly untrue, for no one of the defendants ever intended to come to such a conclusion or to use words which could carry such an interpretation.

It is at this point then that the defence of privilege becomes important and must be considered in reference to each paragraph of the statement of claim.

It was of deep importance to persons interested in horse-racing—and they are many—to know that a certain horse had been found to be doped, and that the responsibility in respect of this had been visited upon the trainer. The plaintiff's own testimony, which I have referred to above, makes this plain and also acknowledges that the Racing Calendar is the place where decisions of the Jockey Club are printed.

But the defence of privilege for the publication in the Racing Calendar—that is as in para. 5—does not rest only upon the above general considerations. It appears to have been accepted by the terms and conditions on which the plaintiff held his licence, and to which he was a party, that the Racing Calendar should be the means whereby communications of matters of interest or importance to those who are engaged in horse-racing should be conveyed. Rule 17 in terms authorizes the stewards, "at their discretion," "to authorise the publication in the Racing Calendar of their decisions respecting any of the above matters"—words which fully cover the publication complained of. Let me add that clause 3 of the trainer's licence in terms authorizes the publication of the withdrawal of a trainer's licence in the Racing Calendar, and rule 66, sub-rule 3 (*a*) points the necessity of some recognized vehicle of communication by which knowledge can become imputed to another for an infringement of that rule and indicates the Racing Calendar as the appropriate means for that purpose. The difficulty of making much out of this publication in the Racing Calendar, published as it was two days after the publication in the Times, had occurred to the plaintiff's counsel when opening the case. For when referring to the effect of rule 17 he said: "I am going to relieve your mind altogether of this point about the Racing Calendar, because that goes only to a few limited racing people. It is the publication to the world of which I complain." Again at the conclusion of the evidence he repeated: "May I just say with regard to it that it seems to me the publication in para. 5 must have a less serious consequence in its nature than the larger publication in paras. 3 and 4, because the words are the same and the publication under para. 5 is limited."

It seems clear, therefore, that this publication, by virtue of its date and the columns in which it appeared, was not relied upon on behalf of the plaintiff as of the same importance as the words complained of in paras. 3 and 4.

It is argued that the plea of privilege is lost, because the right to publish in the Racing Calendar as the paper proper to receive and make public the result of the stewards' inquiry can only relate to what is true, and the jury have found the words used conveyed an untrue signification. This argument does not prevail with me. What was published was the decision of an agreed domestic tribunal in the terms reached by that tribunal. It was for that tribunal to embody its decision in its own terms, provided it acted bona fide, honestly intending to act in accordance with its determination. If it does this, I do not think that after the communication has been published in the course of the ordinary duty of the tribunal the privilege will be lost, because a jury put a different interpretation upon the words used to that honestly intended by the tribunal and which the words simpliciter convey: see *Toogood* v. *Spyring*. (1) The matter was within the jurisdiction of the stewards and, if the inquiry is conducted fairly and properly, there is no appeal from their decision. They must formulate that decision. It cannot be treated as untrue or malicious, because some critic would prefer to draw it in other terms and to add words excluding something which persons outside the jurisdiction of the tribunal read into the actual judgment given.

The case of *Cookson* v. *Harewood* (2) fell to be decided upon issues somewhat different from the present, but I agree with the observations of Scrutton L.J. in the course of his judgment upon that case, and I do not agree with the view presented by the learned judge to the jury. The domestic tribunal uses terms which are intended to convey the proper meaning to those who understand the terms and have knowledge of the jurisdiction exercised. It does not establish a good cause of action to prove that by some others, outside and beyond, one or other different meanings are placed upon the words for which a responsibility is sought to be charged upon the members of the domestic tribunal. This principle is of far-reaching importance. Many disputes are settled by arbitration, by tribunals in particular trades, in trade unions, and in societies of many kinds. It would be, indeed, of serious import if the terms used by the agreed tribunal are to be conned over again by others outside, and a liability imposed upon the members of the tribunal for words used, because of an omission that the others would prefer to have seen introduced; provided always that the conduct of the tribunal has been honest and bona fide: see *Allbutt* v. *General Council of Medical Education and Registration* (3); *Dawkins* v. *Antrobus* (4); and *Maclean* v. *Workers' Union*. (5) Parke B.'s words in *Wright* v. *Woodgate* (6) state the principle:

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(1) 1 C. M. & R. 181, 193.

(2) See Note post, p. 478.

(3) 23 Q. B. D. 400.

(4) 17 Ch. D. 615.

(5) [1929] 1 Ch. 602, 622.

(6) 2 C. M. & R. 573, 577.

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"the occasion on which the communication was made rebuts the inference *primâ facie* arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact." "The occasion is privileged, the communication is protected," says Lord Shaw, in *Adam* v. *Ward*. (1)

It seems, therefore, that privilege attached on the above grounds to the publication in the Racing Calendar. The case of *Hope* v. *I'Anson* (2) does not cover the present facts. That case was decided before rule 17 was in its present form, and the matter complained of and its possible interest as a racing matter to others was very different from that to be dealt with in the present case.

The learned judge ruled that there was no evidence of malice. We were asked to reverse that decision and hold that there was evidence of malice on which an issue should have been left to the jury. It is to be observed that the learned judge did not rule upon this point till after the whole of the evidence had been concluded. He had seen all the defendants in the witness box and heard them cross-examined, and I confess that I should hesitate to differ from the judge who tried the case on such a point; but, after considering all the evidence, I have reached the same conclusion. There is, in my judgment, no evidence of malice. The result is that upon this issue of para. 5 there must be judgment entered for all the first four defendants.

But it is not possible to leave this point without some further consideration, for it has an important bearing upon the other parts of the case. How came it that the jury, who had been told of the lesser importance of the publication in para. 5, gave such large damages for the publication in the Racing Calendar? The learned judge, in the course of his summing-up, explicitly told the jury that "at the time the libel"—if they thought it was a libel—"was published, the plaintiff was already a man who had been warned off the turf. There is no power to question that decision and to that extent he was at that time a damaged man. . . . .

(1) [1917] A. C. 309, 348.

(2) 18 Times L. R. 201.

You must realize that what is complained of here is not the action of the Jockey Club in warning him off (because they are the sole judges of that). The action here is one for libel in publishing of him what is said was not the decision of the Jockey Club."

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The jury intervened in the course of their deliberations to ask the learned judge: "In assessing damages against the Racing Calendar, we wish to know if it is the property of the Jockey Club? If not, can we assess damages against the latter?" And the answer was given: "There is no claim against the Racing Calendar itself, but against the defendants other than the Times for publishing the words complained of in the Racing Calendar."

Counsel for the plaintiff in the course of his final speech had said this: "You will have the words before you in their simplest form, and I am sure his Lordship will tell you that without in the slightest degree attacking the honour or honesty of any one of the stewards (which I expressly disclaimed at the outset and which I repeat), I do attack most gravely the fact that, having done this injustice, they have raised no finger to put it right." This relates to two matters which were legitimately, up to a point, put before the jury and much emphasized. The first was this. Two evening papers were produced—the Evening News and the Evening Standard—and it was suggested to each of the stewards that they had seen them, which they each and all denied; and further that, if they had seen them, there was an opportunity, or indeed a duty upon them, to contradict what it was inferred (for, of course, the papers after the answers given were not, and could not be, put in evidence) was contained in those papers. In spite of this denial and the repeated statement that the honesty of the stewards was not attacked, the incident of the evening papers was the subject of comment: "I may unwittingly have known that there are in the world (and you might be among them) a body of gentlemen who live in such seclusion and so remote from the activities of the world that such things as evening papers are comparatively unknown to them; and, I suppose, if I were asking a jury composed of Lord Harewood, Lord Rosebery, and others like them to look at a paragraph out of an evening paper, I might even have to explain to them by way of preliminary observation that an evening newspaper was a newspaper published in the evening which most people read."

The other was this. Some months after the pleadings were closed, as they were in January, 1931, the Duke of Richmond and Gordon wrote a letter on June 9, 1931, to Lord Rosebery, asking that the latter should grant an interview to the plaintiff and have a talk with him. The defendant replied that, after thinking over what the Duke had suggested about an interview with him, he had come to the conclusion that "it is impossible for me to see him. You see, he is bringing an action against me, and until that case has been heard, it would not be right for me to see him. I should not be acting fairly or honourably towards my fellow stewards nor towards the Jockey Club as a whole if I were to do so. I am sure you will understand this point of view." The reply, dated June 16, accepted that view: "I expect you are right. What C. C. wanted was to ask whether it could not be intimated through the Press that he had been warned off for negligence and not for doping, but I agree that until this action is heard, it would be unwise to have any private discussion between the opposing parties." Adverse comment, however, was made against all the defendants upon this incident, which seems to have followed the usual rules under which litigation is conducted. Further, it was suggested that after these letters had passed, opportunity was taken to amend the defence by introducing a justification of the words used in their ordinary signification. There was nothing in this latter point, for it appeared that the plaintiff, on July 2, obtained leave to amend his statement of claim by adding a further number of innuendoes of a more intensive nature, with the consequence that liberty was reserved to the defendants to amend their defence, and they did so, no doubt upon advice given by their professional advisers.

These incidents bulked large in the speech of the plaintiff's counsel: "I do attack most gravely the fact that having done this injustice they have raised no finger to put it right. I ask you by your verdict to mark the gravest view which ought to be taken of the conduct of these gentlemen in publishing this libel and leaving it uncontradicted in the public Press to-day."

Sir Patrick Hastings told us that the jury under these incentives became "hysterical" in the box, and he thus explained the verdict for 10,000*l.* damages. It is impossible to hold that this figure could have been given upon a just estimate of the matters proper for their consideration, or upon any basis which recognized the conclusive character of the actual decision of the stewards. It would seem that its magnitude shows that the jury were moved by other considerations. They may have misunderstood the invitation of the plaintiff's counsel to find it a pleasant thing to right all which had been done to the plaintiff—"as far as now appears without any justification whatever." That invitation related, of course, to matters subsequent to the decision of the stewards, but its wide terms may have been misinterpreted.

While, as I have stated, judgment must be entered upon this head (para. 5) for the defendants, it leaves a doubt or blur upon the verdict in respect of paras. 3 and 4. The first of these relates to the publication by Messrs. Weatherby, who are the agents of the three stewards, to the news agencies—the latter to the publication in the Times. The judge had to decide, and did decide, that in law the words were capable of a defamatory meaning, and, of course, left the question whether they did bear the meaning imputed to them by the innuendo to the jury. But he rightly cautioned them: "But you must bear in mind in this case that when that publication had been made, the plaintiff had been rightly at that time warned off the turf, that they had a perfect right to warn him off the turf, and that their decision was final." This caution seems to have been overlooked by the jury. If the words are held to bear the meaning suggested in the innuendo they were not chosen by Messrs. Weatherby, who forwarded the announcement to the news agencies, or by the Times. These latter merely received them, and did not alter or enhance their purport by any journalistic device. It seems out of proportion to this tort that 3000*l*. should be awarded in respect of each of these publications and cumulatively 6000*l*. on these two heads against all the defendants. Messrs. Weatherby were not referred to at the trial. Their conduct was not canvassed: "Nobody has said anything to me about Weatherby's," is the comment of the learned judge after the verdict. It seems that the verdict and judgment in respect of both these paragraphs must be set aside.

There remains the question whether the plea of privilege can afford protection to the defendants in respect of these paragraphs. It is said that it was a matter of public interest, that it was the duty of the news agencies and of the Times to give to their clients and readers information that was of interest to all racing people, to all the betting public, to all who stand outside these two classes, but yet take an interest in the sport of horse-racing, and in particular in the maintenance of its honour and freedom from corrupt practices—the practice of drugging horses for races having at that time attracted much attention. These are strong arguments. But though the vehicle of the public Press has been held to be a proper and protected one, so as to defeat a claim for libel, where it has been used "as the only effective mode" to answer a charge which had already received as wide a circulation (see *Adam* v. *Ward* (1) and *Brown* v. *Croome* (2)), there is no authority which protects the statement in the newspaper, where it is made not in answer, but as a fresh item on which a general interest, as distinguished from a particular interest already aroused, prevails. Buckley L.J. in *Adam* v. *Ward* (3) stated a proposition, which was approved in the House of Lords (4) in the following terms: "If the matter is matter of public interest and the party who publishes it owes a duty to communicate it to the public,

(1) [1917] A. C. 309.
(2) 2 Stark. 297, 301.
(3) 31 Times L. R. 299, 304.
(4) [1917] A. C. 309, 322.

the publication is privileged, and in this sense duty means not a duty as a matter of law, but, to quote Lindley L.J.'s words in *Stuart* v. *Bell* (1), 'a duty recognized by English people of ordinary intelligence and moral principle.'" But these words must be taken in relation to the facts of the case. It appears to me that the learned judge meant by the words "matter is of public interest," "has already become of public interest." The duty cannot arise in respect of a matter not yet made public to all.

For these reasons, it seems that the right course will be to direct a new trial as to paras. 3 and 4. The jury should be directed that they cannot impeach the decision which was reached that the publication was in the ordinary course of the news agencies' and newspapers' business; and was a matter which must in any case have become known to a very large circle through the protected publication of the Racing Calendar on October 2.

The appeal will be allowed with costs. Judgment must be entered for the defendants with costs upon the issue at the trial as to para. 5, and a new trial ordered as to paras. 3 and 4, the costs of those issues at the trial before Horridge J. to be in the discretion of the judge before whom the new trial takes place.

SLESSER L.J. On September 29, 1930, there was held before the stewards of an association known as the Jockey Club an inquiry into the alleged drugging of a horse called "Don Pat," and also into the responsibility of the trainer of the horse, Mr. Charles Chapman, who is the plaintiff in this case. This case is not directly concerned with that inquiry, but, in so far as the alleged libels complained of arise out of reports of the findings of that inquiry, it is convenient to state certain matters which explain how the inquiry into the position of Mr. Chapman came to be held.

On March 13, 1930, Mr. Chapman received from the stewards of the Jockey Club what is known as a trainer's licence to train horses to run under the Rules of Racing during the year 1930. The licence was expressed to be subject to conditions, the first of which was that the licence was issued subject to the Rules of Racing for the time being. Clause 3 provided that a trainer's licence might be withdrawn or suspended by the stewards of the Jockey Club in their absolute discretion, and such withdrawal or suspension might be published in the Racing Calendar, the recognized organ of the Jockey Club, for any reason which might seem proper to them, and that the stewards should not be bound to state their reasons.

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(1) [1891] 2 Q. B. 341, 350.

The legal relation between Mr. Chapman and the Jockey Club primarily depended upon this licence, whereby he agreed to be subject to the Rules of Racing for the time being; that is, to the rules of racing of the Jockey Club.

The most important rule of racing with which we are here concerned is rule 17, which is to the following effect: "The Stewards of the Jockey Club have power, at their discretion, to grant, and to withdraw, licences to officials, trainers, jockeys, and race-courses; to refuse to allow any person to act or continue as an authorised agent; to fix the dates on which all meetings shall be held; to make inquiry into and deal with any matters relating to racing, and to warn any person off Newmarket Heath; and to authorise the publication in the Racing Calendar of their decisions respecting any of the above matters."

At the inquiry, Mr. Chapman duly appeared before the stewards, the Earls of Ellesmere, Harewood and Rosebery, the Earl of Rosebery being in the chair, and he was confronted with evidence that his horse had been found drugged, which evidence he did not dispute. It is not seriously suggested that the inquiry was conducted in any other than a proper manner, though it was faintly urged that the inquiry continued in his absence, but an inspection of the Report of Proceedings satisfied me that that was not so. The plaintiff himself said in cross-examination: "I was treated by the stewards with every courtesy; my witnesses were called and examined by the stewards and I did not fully appreciate what I could ask them. Every opportunity was given me to call witnesses I desired. I was asked on one or two occasions if I had anything more to say. I think the stewards wished to give me every opportunity of dealing with every part of the case. I had every opportunity of elucidating the points I wished to make. I was never stopped; I had a patient and fair hearing of all the matters I desired to put forward." Mr. Chapman was subsequently called back into the room, and Lord Rosebery told him that the stewards would have to withdraw his licence and warn him off Newmarket Heath.

The report of the inquiry was fully considered at the trial, and it is common ground that the decision arrived at was based upon the view that, in the stewards' opinion, a trainer is directly responsible for the care of his horse, and that the plaintiff was guilty of a dereliction of duty, and not upon any finding that the plaintiff had himself drugged the horse or caused it to be drugged. The actual language used by Lord Rosebery, the chairman, to Mr. Chapman in giving his decision was this: "We have given the most careful thought to this case. We have come to the conclusion that 'Don Pat' was doped, and he is disqualified for life. We consider you, as trainer, were directly responsible for the care of the horse. Your licence to train is revoked, and you are warned off Newmarket Heath."

It is not necessary at this stage to say anything more about that inquiry, but on the same date—namely, September 29, 1930, Mr. Thomas Shears, a telephonist employed by the Exchange Telegraph Company, received a message by telephone from Messrs. Weatherby that they had got a statement for publication in the Press, and they were asked to send for it, which they did. This statement, which was subsequently published to three news agencies, is the libel complained of. It is in the following terms: "The acting stewards of the Kempton Park Second Summer Meeting (Major Mark Weyland, Sir William Cooke and the Hon. T. Egerton) met on 13th September to receive the result of the examination which they had ordered to be made of 'Don Pat' after winning the Bedfont Highweight Handicap. Having interviewed Mr. Rowe, the owner of 'Don Pat,' and C. Chapman (meaning the plaintiff) the trainer, they referred the case to the stewards of the Jockey Club. The stewards of the Jockey Club (Lord Ellesmere acting for Lord Zetland) after further investigation, satisfied themselves that a drug had been administered to the horse for the purpose of the race in question. They disqualified the horse from this race, and for all future races under their rules, and warned C. Chapman, the trainer of the horse, off Newmarket Heath."

A similar statement was published in the Times newspaper by the Times Publishing Co. on September 30, 1930, under the heading: "Racing: Another Trainer Warned Off, the Doping of 'Don Pat.'" The same statement appeared in the Racing Calendar on October 2, 1930. No point is made of the existence of the heading in the Times, and throughout the trial the impeached statements, whether published to the news agencies or in the Times or in the Racing Calendar, were treated as identical.

By para. 7 of the statement of claim it was alleged that the words complained of meant, and were understood to mean, that the plaintiff (*a*) had administered or caused to be administered a drug to the said horse; and/or (*b*) had been guilty of the criminal offence of cruelty to the said horse; and/or (*c*) was unfit to be a trainer of racehorses; and/or (*d*) had acted in a dishonest manner; and/or (*e*) had been guilty of some corrupt or fraudulent practice; and/or (*f*) was incompetent or negligent; and/or (*g*) was a person whom no owner of racehorses ought to trust or employ; and/or (*h*) was an undesirable person to have on racecourses and unfit to associate with gentlemen of the turf. This allegation was denied in para. 6 of the defence, where it was stated that the words did not mean, and were not understood to mean, what was alleged. The paragraph further said that the said words are not capable of the said meanings or of any other actionable or defamatory meaning. By para. 7 of the defence it was pleaded that the said words without the said meanings are not libellous, and by para. 7 (*a*) it was contended that the said words, according to their natural ordinary signification and without the said meanings, were true.

At the end of the trial there was left to the jury this question among others : " Are the words set out in paras. 3 and 5 of the statement of claim " (that is the statement complained of) " true in their ordinary meaning ? " Answer : " No." " Do the words mean that the plaintiff was a party to the doping of 'Don Pat' ? " Answer : " Yes."

In my view it was not possible, on the language as published, for the jury to return an answer that the words were not true in their natural meaning. If I analyse the notice I find that the first three paragraphs are an exact historical statement of what happened at the inquiry before the stewards of the Jockey Club, and of what happened at the preceding inquiry to which I have not had occasion to refer —namely, one before the stewards of the Kempton Park Summer Meeting where the horse competed. The last paragraph of the statement, of which alone complaint is made, that the stewards of the Jockey Club " disqualify the horse for the race and for all future races under their Rules," so far as regards the words in their natural meaning, was true, and the statement continued : " and warn C. Chapman, the trainer of the horse, off Newmarket Heath." These words in their natural meaning were also true. When the jury were asked the question : " Do these words mean that the plaintiff was a party to the actual doping of 'Don Pat' ? " they were, in my view, not finding the words in their natural meaning true, but accepting the innuendo pleaded in para. 7 of the statement of claim which I have set out. I think it important at the outset to say that, in my judgment, the finding to be supported must be based solely upon an innuendo, and not upon the natural meaning of the words, which is an accurate statement of historic fact.

The learned judge in summing-up to the jury said : " The first matter with which you will have to deal, and really the only matter, is as to whether these words are, in their ordinary meaning, true. When you write something of a person it is not what you intend to say, it is what you do say that matters, and the test of what you have said is what any reasonably minded person reading that would say it meant."

He went on to say this: "But I want to give you one slight qualification of it, and it is this, that if it bears an innocent meaning and at the same time a libellous meaning can be taken out of it, you must not necessarily apply the libellous meaning to it, you must test it by whether or not a reasonably minded person reading it would say that the libellous meaning is one which ordinary people would put on it." He quotes with approval the language of Lord Halsbury where he states: "It is not enough to say that by some person or another the words might be understood in a defamatory sense. The test in these cases is this: Is the meaning sought to be attributed to the language alleged to be libellous one which is a reasonable, natural or necessary interpretation of its terms? It is unreasonable that when you have a number of good interpretations the only bad one should be seized upon to give a defamatory sense to the document." "Therefore, what you have to ask yourselves is this: Would a reasonably minded person, reading this document, say that it meant that Mr. Chapman had been warned off the turf because he himself had been a party to the doping of 'Don Pat'?"

It is quite clear that the statement itself does not say this, but merely relates to what happened at the inquiry and the decision thereon, and the direction of the learned judge, which I have quoted, indicates again to my mind that on this point he was really asking the jury whether they would or would not find the truth of the innuendo pleaded. The whole matter appears to me to turn upon innuendo, and not upon the natural meaning of the words. And the finding of the jury is confused by their failure to recognize this fact. The importance of this conclusion in the present case is greatest in connection with the Racing Calendar, for reasons which I now state.

The defendants, in addition to saying that the words are true in their natural meaning and are not capable of being defamatory in that meaning, have pleaded the defence of privilege; and, further, as regards one publication of the defendants other than the Times, that in the Racing Calendar, they say that the plaintiff, by his assenting as a condition to the granting of a licence that he would be bound by the Rules of Racing, has agreed to the publication of the results of the stewards' decisions in the Racing Calendar and cannot be heard to complain of a tort to which he himself has assented.

I propose to deal with this case of the publication in the Racing Calendar first, as it presents certain peculiar features which do not apply in the case of the other publications with regard to the assent of the plaintiff to the publication. This defence is based upon the doctrine volenti non fit injuria. In the words of Salmond on Torts, 7th ed., p. 58: "No act is actionable as a tort at the suit of any person who has expressly or impliedly assented to it: *Volenti non fit injuria.* No man can enforce a right which he has voluntarily waived or abandoned": see *Smith* v. *Baker & Sons* (1), a case of negligence to which the principle has been expressly applied, but it is of general application. The argument of Sir Patrick Hastings for the plaintiff to avoid the consequence of the apparent consent to publication in the Racing Calendar is as follows: he says that the plaintiff has only consented to the publication of the decision of the stewards, which I have quoted but repeat, that they "considered the plaintiff as trainer directly responsible for the care of the horse"; that is to say, to a finding that he was under a duty to see that the horse was not drugged, which duty he failed to perform. Sir Patrick points out that the jury, having found that the statement in the Racing Calendar meant that the plaintiff was a party to the actual drugging of "Don Pat," it is a statement, as the jury have construed it, which is not the publication of the decision of the stewards, in that the stewards, to put it briefly, held that the plaintiff was negligent in not preventing the drugging of the horse, whereas the publication alleged that he had actually drugged it. On this matter, the conclusion at which I have already arrived, that the finding of the jury is directed to an innuendo and is not a finding as to the actual meaning of the words, becomes so material, for if the plaintiff assented to a report of the decision of the stewards, and they used words which were not a report of that decision, Sir Patrick Hastings' argument would have great weight; but if, on the other hand, in fact, they did report the actual decision, but in such a way that the jury say that it was to be understood to mean something other than the actual decision, that is a risk which the plaintiff, by agreeing to a report of the decision, has elected to run.

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(1) [1891] A. C. 325.

The matter is not free from authority. In the case of *Cookson* v. *Harewood* (1), which was heard by Scrutton L.J., Greer L.J. and myself, in October, 1931, a very similar rule to the one here under consideration provided that the stewards could, in their absolute discretion, warn off any person from all racecourses where the rules were enforced without assigning any reason for so doing, and by a further rule it was recognized that the fact of his being warned off might be published in the Racing Calendar. An inquiry was held by the stewards of the Pony Turf Club, and Mr. Cookson was warned off all courses under their control in accordance with rule 170, a rule very similar to rule 17 in the present case. This statement was subsequently published in the Racing Calendar, and an action for libel was thereupon instituted. Scrutton L.J. quoted the words which appeared in the Racing Calendar, which were as follows: "Notice. As a result of an inquiry held by the stewards of the Pony Turf Club, the following person was warned off all courses under their control in accordance with rule 170: Ernest Sawrey Cookson," and his Lordship continued: "That is the libel. It is perfectly obvious that that is quite true, every word of it. The stewards did hold an inquiry on that date mentioned, and they did at that inquiry come to a decision that Ernest Sawrey Cookson should be warned off all courses under their control in accordance with rule 170. . . . . The plaintiff by applying for a licence and acting as an official under the Pony Turf Club Rules, is bound by the rules to accept the decision of the stewards. . . . . From that point of view . . . . . questions about innuendoes are quite beside the mark. If you get a true statement and an authority to publish the true statement, it does not matter in the least what people will understand what it means. The plaintiff has submitted to the jurisdiction." The other members of the Court dealt with other matters which arose in that case on the discrepancy of certain answers returned by the jury, but clearly agreed with the view on the matter here material expressed by Scrutton L.J. Indeed, Sir Patrick Hastings scarcely disputes that if the defamatory matter here can only be sustained by innuendo, the plaintiff has assented to the publication. His case is that the words in their natural meaning are defamatory and so not a true report of the decision; but, for myself, for the reasons I have given, I think the case can only be based on innuendo, and, applying the doctrine of volenti non fit injuria, I hold that the plaintiff must fail in respect of the publication in the Racing Calendar by reason of his assent thereto.

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(1) See Note post, p. 478.

The second ground on which the publication in the Racing Calendar is defended is based upon privilege. This defence raises problems of considerable difficulty. The Racing Calendar, according to the evidence of the plaintiff, circulates mostly among racing people; it is the publication in which the decisions of the Jockey Club are printed, but it is registered as a newspaper and can be obtained at a high price by the general public. It was contended before us that racing has now become so much a matter of general interest that the requirements of privilege for publication in a newspaper are satisfied; that is to say, that there was not here any unnecessary publicity given to the findings, and that the defendants did no more than their duty in giving this wide publicity to the public who are so widely interested. In the words of Lord Loreburn, in *Adam* v. *Ward* (1): "A man ought not to be protected if he publishes what is in fact untrue of some one else when there is no occasion for his doing so." In that case there had been a confidential report made with regard to the plaintiff by his senior to the general officer commanding, which ultimately reached the War Office, and, as a result of various considerations, the plaintiff was placed on the retired list upon half-pay. He then became a member of the House of Commons and made a speech with reference to his rights and injuries as he conceived them. The Army Council then issued through the Press a letter which the plaintiff complained of as a libel upon him; with regard to which he sued the Secretary to the Army Council. The defendant pleaded privilege and the House of Lords decided, having regard to the publicity which had taken place through the parliamentary debate and having regard to the general interest which the subject may be assumed to have in the Army, that the publication was not excessive. Lord Dunedin (1) in terms approves the reasons given in the Court of Appeal by Buckley L.J., as he then was, and a reference to the report of the case in the Court of Appeal (2) shows that Buckley L.J. had said that: "The public interested in this matter is not, I think, confined to the public in the United Kingdom; it extends to all those who are interested in matters vitally affecting the Military Forces of the Crown. This extends to all subjects of the Crown. Further, the plaintiff's speech was delivered in such circumstances that it might well reach all such members of the public as would be reached by the publication made of the defendant's libel."

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(1) [1917] A. C. 309, 321.

The next case to which I will refer on the matter of excessive publication is that of *Allbutt* v. *General Council of Medical Education and Registration.* (3) In that case the General Council, who are a statutory body, after a proper inquiry, adjudged a medical practitioner to be guilty of misconduct in a professional respect and published the minutes of the Council containing a statement to that effect. The book in which these minutes were published was obtainable by the public, but the publication was held to be privileged, I think, because, in the language of Lopes L.J. (4), the public were clearly interested. The preamble of the Act states that it is expedient that persons requiring medical aid should be able to distinguish qualified from unqualified practitioners; and in my view the finding of the Court in that case that the privilege was not exceeded is due to the peculiar statutory obligations of the Medical Council and to the general public interest in the qualification of doctors.

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(1) [1917] A. C. 322.

(2) 31 Times L. R. 299, 304.

(3) 23 Q. B. D. 400.

(4) Ibid. 400, 409.

I find it impossible to say that publication in the Racing Calendar was not excessive by reason of the general public interest in racing. It is true that one witness said that the interest in golf, filming, motoring and broadcasting had increased. If we are to speculate about the respective interests in various subjects every time a plea of privilege is urged in the case of general newspaper publications the time of the Courts will be very fully occupied.

I am unable to find in the authorities any reason to suppose that the law has protected a general publication in cases where there is only a sectional interest and a consequential duty to inform only a part of the public. This was the view indicated as regards this very publication in *Hope* v. *I'Anson* (1), where Collins M.R. said (2): "The decisions were not of such general public interest as to make the occasion privileged; the decisions were of interest to a section of the public—those interested in racing matters—but they were not of interest to the public as a whole."

Nevertheless, for a different reason, I have come to the conclusion that the defendants may plead privilege here. The reason is that the parties have chosen of their own accord to make the Racing Calendar a means of communication between the racing public and the Jockey Club. The licence itself, clause 3, and a number of the Rules of Racing make this quite clear. Rule 1 states in fact that the Racing Calendar and its component parts are works published by authority of the Jockey Club. Rule 17 has already been mentioned, and it authorizes not only publication in the Racing Calendar of cases of persons warned off Newmarket Heath, but also of all the other decisions of the stewards of the Jockey Club, such as licences, agencies, dates of meetings,

(1) 18 Times L. R. 201. (2) 18 Times L. R. 205.

and generally their decisions to make inquiry into and deal with any matters relating to racing.

I find that the Racing Calendar is also referred to in rule 66 as a means of stating that a horse is not qualified to be entered or run in any race, and I think, therefore, that the plaintiff cannot be heard to say that to publish decisions in the Racing Calendar generally is not within the ordinary duty of the stewards of the Jockey Club.

In the well known case of *Toogood* v. *Spyring* (1) Parke B. said that statements "made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned," are privileged. In *Brown* v. *Croome* (2) Lord Ellenborough indicated that if it could be shown that an advertisement in a newspaper was the only possible means of making known certain circumstances, that might be sufficient to vindicate the mode. So also in *Delaney* v. *Jones* (3) it was held that an advertisement published in a newspaper conveying an injurious imputation is not libel, if done bona fide, and with a view of obtaining information on the subject alluded to in the advertisement, by a person really interested in the discovery. This also was a dictum of Lord Ellenborough. I do not quote these old cases as binding authority, but rather to support the view to which I have come independently of them to the effect that where there is only one reasonably possible mode of communication in all the circumstances, the use of that mode is privileged when it is consented to by the plaintiff himself.

I think, in all the circumstances, although the Racing Calendar might come into the hands of persons not interested in racing, yet, on a reasonable view of the duty of the defendants to keep racing free from impropriety and to protect horses from cruelty, they were entitled to publish their decisions in their own organ even if that organ was not prevented by them from coming into the hands of the public. For this reason also, therefore, I do not think that so much

(1) 1 C. M. & R. 181, 193.

(2) 2 Stark. 297.

(3) (1805) 4 Esp. 191.

of the judgment as concerns the publication in the Racing Calendar can be supported. It will be noted that since the decision in *I'Anson's* case (1) the power to publish decisions in the Racing Calendar has been added in express terms to rule 17.

As regards the publication to the news agencies and to the Times, for both of which the defendants other than the Times Publishing Company are attacked, and as regards the liability of the Times Publishing Company itself, my decision that there is no general interest to the public or duty owed to the public to publish matters which concern a section of the public only, which decision I have already indicated in connection with one of the proposed grounds for privilege in the case of the Racing Calendar, necessarily deprives all publications other than that of the Racing Calendar of privilege, and, therefore, apart from the publication in the Racing Calendar, which is protected for the two peculiar reasons which I have stated, there is, if the finding of the jury can be supported, no defence to the action against any of the defendants in any matter other than the publication in the Racing Calendar.

Lastly, the learned judge ruled that there was no evidence of malice. I agree; there was absolutely none.

There remains, however, the important question of damages. The jury in respect of the publications to the news agencies and to the Times respectively returned the damages at 3000*l*. in each case. In the case of the Times, the Times Publishing Company would be liable as well as the other defendants as joint tortfeasors. In the case of the publication to the news agencies, the defendants other than the Times would alone be liable. But before I discuss the appeal as regards these damages, I would say a word as to the 10,000*l*. found by the jury as damages in respect of the publication in the Racing Calendar.

The question of the propriety of these damages has now strictly become unnecessary to consider, but, although I think that judgment should be entered for the defendants

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(1) 18 Times L. R. 201.

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in respect of the publication in the Racing Calendar, I think it right to add a few words to indicate that, in my opinion, in any event, this award of the jury could not be supported. Sir Patrick Hastings in his speech to us argued that we should not find these damages to be excessive. He defended them as punitive damages, properly awarded, because the stewards had taken no steps to correct the misunderstanding produced by their statement, which the jury have found to have meant that the plaintiff had drugged a horse. He said that the stewards had suggested that they did their best to correct the misunderstanding, but under cross-examination it did not appear that they had done anything. He said that when certain newspapers were proffered to them they denied that they had seen the particular issues put to them. This, said Sir Patrick, was a complete surprise, and he had suggested to the jury that the stewards were not frank in the matter. Moreover, he said, it was to be noted that at the very time when Lord Rosebery was refusing the Duke of Richmond's request, on behalf of the plaintiff, to correct any misunderstanding as to the meaning of the statements published, the stewards' defence was being amended by pleading the words in the statement of claim in their natural meaning did not mean that the plaintiff had drugged the horse.

Dealing with these matters in order, several of them are open to criticism. First, Sir Patrick himself had said to the jury that he did not suggest that the stewards were not frank in denying that they had seen certain newspapers, and there was no evidence to question their statements on this matter. Secondly, as regards the amendment of pleading, it appeared on investigation that the defendants' amendment in which they pleaded the partial justification was occasioned by an amendment of the plaintiff himself, which was made pursuant to an order by the Master on July 2, 1931, whereas the amendment of the defendants was not made until July 20, 1931, and, in any event, in para. 7 of the defence, before there was any amendment, the defendants had pleaded that the said words without the said meanings (that is, the meanings imputed to the words by the statement of claim) were no libel. Thirdly, as there was no reason to suppose that the defendants had seen any misinterpretation of the language to exist on any large scale, and, as Lord Harewood had stated that he had put it right wherever he found the statement misconstrued, I cannot see how the jury were justified in giving punitive damages for want of an explanation subsequent to the inquiry by the stewards of their published statement; and, finally, on this head, I have come to the conclusion that the action of the jury can be explained, in part, by their failure to distinguish between such injury as the plaintiff may have suffered as the result of the decision in the inquiry and the injury which he is alleged to have suffered through the publications, although it is true they were directed by the judge not to make such a confusion. The fact that at a certain stage in their deliberations they sent for the pleadings and sent a communication to the judge to this effect, that "in assessing damages against the Racing Calendar, we wish to know if it is the property of the Jockey Club. If not, can we assess damages against the latter? We have not been provided with the statement of claim," all indicate that they were seeking to penalize the Jockey Club for their general behaviour, which the jury appeared to have disliked.

But, apart from these considerations, there is a serious question of principle involved in the assessment of these damages. Whatever might be the view of the jury as to the behaviour of the stewards, there can be no suggestion that there was any ground against Messrs. Weatherby, their co-defendants, for assessing punitive damages against them. Damages against joint tortfeasors cannot be divided. The jury have no power to apportion the damages, and, if they did so, judgment cannot be entered against the several defendants for the amount so apportioned: *Greenlands, Ld.* v. *Wilmshurst and London Association for the Protection of Trade.* (1) But this does not dispose of the matter, for though there must be one set of damages against joint tortfeasors, the authorities go to show that such damages are not to be assessed according to the act of the most guilty or the most innocent of the defendants, but according to the aggregate of injury received from their common act (*Clark* v. *Newsam* (1)), as was said by Alderson B. in that case (2): "The true criterion of damage is the whole injury which the plaintiff has sustained from the joint act of trespass." This principle has been recently applied by Avory J. in the case of *Maxwell* v. *Keun* (3), and should have been applied in the present case. Whatever the result might have been, the jury should have been told to consider, in any event, the innocence of Messrs. Weatherby, and to have taken into account their innocence as well as the conduct of the stewards and so have arrived at one resultant sum. The failure to do this, in my judgment, is another reason why their award of damages of 10,000*l.* cannot stand in any event.

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(1) [1913] 3 K. B. 507; [1916] 2 A. C. 15.

Finally, there is to be considered the position as to damages against all the defendants in respect of the publication in the Times of 3000*l.* and against all the defendants other than the Times in respect of the publication to the news agencies also of 3000*l.* In my view, the assessment of damages against the defendants other than the Times must be treated as being infected by the error of the jury in respect of the damages for publication in the Racing Calendar. If the jury wished to give punitive damages in respect of the Racing Calendar, they may also have included punitive damages in the case of the conduct of the stewards in the other publications; for all of these the stewards were equally responsible, and the liability of the Times as joint tortfeasors in their case is in part dependent upon the liability of the other defendants.

The observations which I have made as to the neglect of the jury to consider the innocence of Messrs. Weatherby in their resultant damage apply equally to their failure to consider the position of the Times as joint tortfeasors with the stewards and Messrs. Weatherby. My conclusion is that the whole question of damage must be reconsidered in a new trial excluding the case of the publication in the Racing

(1) 1 Ex. 131.

(2) 1 Ex. 140.

(3) Times Newsp., Feb. 3, 1928.

Calendar, which I have held to be both consented to by the plaintiff and privileged.

Finally, I have to consider whether the new trial should be limited to the question of damages or whether the whole matter, in so far as it has not here been disposed of, should go for a new trial. The error in seeking to put a different natural meaning upon the words complained of instead of asking whether or not the words complained of properly supported the innuendoes pleaded is radical and in itself is a justification for a new trial. The whole matter has become so confused that I do not think that this Court should in any way limit the issues which may properly be put before another jury.

In the result, therefore, I hold that this appeal succeeds, that a new trial should be ordered on the issues of the publication to the news agencies and to the Times, and that the defendants other than the Times newspaper wholly succeed on the issue of the publication in the Racing Calendar, and that consequently this matter should not go for a new trial. I agree with the judgment of my Lord with regard to the order as to costs.

ROMER L.J. I agree with the order that has been proposed by the Master of the Rolls, and will state as shortly as possible my reasons for doing so.

In my opinion the stewards of the Jockey Club and Messrs. Weatherby are protected from liability in respect of the publication in the Racing Calendar upon the ground that it was made upon a privileged occasion. I cannot myself doubt that the stewards owe a duty to all persons interested in racing under the Rules of the Jockey Club to keep them informed of their decisions arrived at upon the matters that from time to time are brought before them in accordance with those rules. Nor can I doubt, in view of the provisions of rule 17, that as between the stewards and persons who submit themselves to the rules, the Racing Calendar is the proper medium for communicating those decisions. If this be so, the fact, if fact it be, that the communication is made in terms that are defamatory seems to me from the point of view of privilege to be immaterial, in the absence, of course, of malice. The defence of privilege is only required where the communication is defamatory. The question, as I regard it, is not whether having regard to rule 17 the plaintiff assented to the particular communication made through the Racing Calendar so as to enable the defence of volenti non fit injuria to be raised, but whether the plaintiff assented to the Racing Calendar being used in general as the medium for informing the racing public of matters which the stewards owe a duty to communicate to them. As, in my opinion, the plaintiff did so assent, the occasion on which this particular communication was made rebuts the inference (to use the language of Parke B.) prima facie arising from the fact that the statement, in the view of the jury, was prejudicial to the character of the plaintiff. Judgment should therefore be entered for the stewards and Messrs. Weatherby in respect of the publication in the Racing Calendar, unless there was some evidence of malice to go to the jury. Horridge J., who had all the evidence before him, ruled that there was none, and I should hesitate long before venturing to differ from so experienced a judge upon such a question. But Sir Patrick Hastings expressly stated that he did not question the honesty or honour of the stewards, and how a man who makes a defamatory statement maliciously, even giving to that word its wider legal sense, can be described as either honest or honourable is not very easy to see.

As regards the publication to and in the Times, and to the press agencies, the defence of privilege cannot, I think, prevail. So far as regards the stewards, such a publication seems to me to go beyond any duty that they owed to any one. So far as regards the Times Publishing Company, it may in one sense be true to say that they owe a duty to their readers to publish any and every item of news that may interest them. But this is not such a duty as makes every communication in their paper relating to a matter of public interest a privileged one. If it were, the power of the Press to libel public men with impunity would in the absence of malice be almost unlimited. Nor, indeed, did Mr. Stuart Bevan on their behalf put his claims so high. He founded their claim to privilege, as I understand him, upon certain observations made by Greer L.J. in *Cookson* v. *Harewood.* (1) In the course of his judgment in that case the Lord Justice said this : " In my judgment any one who knows that a man has been convicted of larceny at a criminal trial before a Court of competent jurisdiction is entitled to say, without being sued for slander or libel, that that man has in fact been convicted. It seems to me that, if a man submits to a domestic tribunal, equally any person is entitled to record the fact that that domestic tribunal decided against him. If it is a question relating to a school, and a boy is expelled by the competent authority, I think that any one can say, without being sued for slander or libel, that the boy was, in fact, expelled. The same thing would apply to expulsion from a club. When a man subjects himself to a domestic tribunal he must be in exactly the same position as regards complaining of a record of that domestic tribunal as every citizen who has to submit to the lawful tribunals of the country." If these observations are intended to extend to domestic tribunals the privilege given by the common law to reports of proceedings before a Court of justice open to the public, I am, with all respect to the learned Lord Justice, unable to agree with them. For the ground of the common law privilege seems to be that, as the public are entitled to be present, they are entitled to be informed of what has taken place in their absence. I know of no authority for extending the privilege to a proceeding before a domestic tribunal such as the stewards of the Jockey Club, and in my opinion it cannot be so extended. For these reasons it seems to me that the defence of privilege fails as to the publications in the Times and to the press agencies.

In these circumstances, the question arises as to whether in respect of these publications the verdict of the jury should be allowed to stand or whether there should be a new trial.

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(1) See Note post, p. 478.

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In my opinion there ought to be a new trial. The jury had been told, in effect, by Sir Patrick Hastings that from the point of view of the plaintiff these two publications were of far greater importance than the publication in the Racing Calendar. The jury nevertheless awarded 3000*l.* in respect of each of the more harmful publications, and 10,000*l.* in respect of the less important one. It was suggested on behalf of the plaintiff that this latter sum included vindictive damages, which I understand to mean damages awarded against the defendant stewards by way of punishment in addition to the damages actually sustained by the plaintiff. What act or omission on the part of the stewards called for vindictive damages has never been made very plain to me. It was said that they refused to accede to a request on the part of the plaintiff, conveyed to Lord Rosebery by the Duke of Richmond, to publish a statement to the effect that they did not charge him with being a party to the doping of "Don Pat," and had merely warned him off the turf for negligence in his capacity of trainer of the horse. It would not, however, have been reasonable to expect them to publish such a statement without adding that they never had suggested anything to the contrary. Now the action was at this time pending, and the principal issue in the action was whether the publications complained of did or did not contain a suggestion to the contrary. In those circumstances, the publication of the statement with the addition would have been highly improper. To ask for the statement without the addition would have been unreasonable. It was further suggested that the publications complained of in the action had conveyed to a number of newspapers, in particular certain evening newspapers, much the same meaning that was alleged by way of innuendo in the statement of claim, and that the stewards had never taken the trouble to put the newspapers right. In the course of Lord Harewood's cross-examination he was asked this question: "Are you aware that every evening newspaper in London misconstrued the notice you sent out?" This question was naturally objected to and was disallowed. But thereupon (and of course quite legitimately) various papers were put to him and, subsequently, both to Lord Rosebery and Lord Ellesmere. None of these three witnesses had, however, seen any of these papers before, and their contents were therefore never in evidence. We were told nevertheless that when these three stewards denied having seen any of the newspapers produced by counsel the jury became "furious" and "hysterical." If this fury and hysteria completely wore themselves out in awarding the 10,000*l.*, the matter from the point of view of damages is not of any importance, as we are directing judgment to be entered for the defendant stewards and Messrs. Weatherby in respect of the Racing Calendar publication. But we have no sure ground for thinking that the excitement engendered in the minds of the jury by the omission of these three gentlemen to read the particular papers in question and the jury's desire to punish them is not to some extent reflected in their award of the two sums of 3000*l.* It seems to me essential therefore that the question of damages for the publications in the Times and to the Press agencies should be reconsidered by a new jury. For the excitement appears to me to have been quite unwarranted, and I can see no real justification for punishing these gentlemen, whose honour and honesty are not questioned.

It is, moreover, to be observed that Messrs. Weatherby have also been made liable for the two sums of 3000*l.* without apparently their position having been considered by the jury at all. We have the statement of the learned judge himself that no one had said anything to him about Messrs. Weatherby until after the verdict. If nothing was said to him about them, it may be assumed that nothing was said to the jury.

But I do not think that the amount of damages is the only thing that should be re-tried. The question of libel or no libel should also be submitted to a new jury, and for this reason. The cross-examination as to the newspapers to, which I have already referred must indubitably, though I have no doubt quite unintentionally, have left in the minds of the jury the conviction that every evening newspaper in London or many of them, and also some morning newspapers had put upon the words complained of the meaning that the jury were being asked by the plaintiff to attribute to them. Of this fact, however, there was no evidence whatsoever. I am afraid, too, that from the concluding speech for the plaintiff the jury may have obtained the impression that it was not until about June, 1931, that the stewards themselves put forward the view that they had never alleged that the plaintiff had doped "Don Pat." In a letter to the Duke of Richmond, Lord Rosebery said that as far as he knew the stewards had never said that Chapman doped the horse. In commenting upon this, Sir Patrick Hastings said: "That was on June 19. After that somebody thought: 'Well, if that is your view we had better put it in our defence.' If they had not put that in there would have been no defence. It was only last July that they thought of this defence, namely, that there is an innocent meaning to these words." These observations were due to a misapprehension as to the reason why the statement of defence was amended and as to the contents of that document in its original state.

In all these circumstances, however, it is in my opinion eminently desirable that there should be a new trial of the question as to the meaning to be attributed to the words of the publications complained of.

Appeal allowed. Judgment for first four defendants on para. 5 of claim with costs. New trial on paras. 3 and 4.

Solicitors for stewards of Jockey Club and Messrs. Weatherby: *Charles Russell & Co.*

Solicitors for Times Publishing Company, Ld.: *Soames, Edwards & Jones.*

Solicitors for plaintiff: *Windybank, Samuell & Lawrence.*

NOTE.

COURT OF APPEAL. OCT. 15, 16 AND 19, 1931.

COOKSON *v.* HAREWOOD.

[1929. C. 4595.]

Appeal from the judgment of Horridge J. in an action tried by the learned judge and a special jury.

The action was brought by the plaintiff Ernest Edward Sawrey Cookson, a trainer of racehorses and a bloodstock agent, against the Earl of Harewood, Sir William Bass, Bart., the Earl of Carnarvon, Major-General C. L. Gregory, Major R. G. Alexander and Major F. P. Stapleton-Bretherton, the stewards of the Pony Turf Club, and the Sports Printing Press, printers of the Pony Turf Racing Calendar, claiming a declaration that his name was wrongly placed on the forfeit and warned-off lists of the Pony Turf Club contrary to the rules of the Club and contrary to natural justice, and damages for alleged libel.

The plaintiff, who was clerk of the course at West Malling pony races in the autumn of 1927, complained that without giving him any opportunity to hear and reply to any charge against him, the stewards of the Pony Turf Club in March, 1929, resolved to put him on the forfeit list on the ground that certain stakes won at West Malling in 1927 had not been paid. Mr. Cookson said that he was not liable for the payment of the stakes, and that he had suffered damage by the stewards causing to be published in Pony Turf Club Racing Calendar a notice to the effect that he had been warned off all courses under their control.

The stewards of the Pony Turf Club, in their defence, denied that they acted contrary to their rules or natural justice. All the defendants said that the words complained of were not libellous, and that according to their natural and ordinary signification, they were true in substance and in fact.

Horridge J. dismissed the action and directed judgment to be entered for the defendants.

The plaintiff appealed.

Serjeant Sullivan K.C. and *Martin O'Connor* for the appellant.

Sir Patrick Hastings K.C., *Hon. Geoffrey Lawrence, K.C.*, and *Walter Frampton* for the first six respondents, the stewards of the Pony Turf Club.

E. J. C. Neep for the respondents, the Sports Printing Press.

SCRUTTON L.J. Serjeant Sullivan, in the course of nearly three days that he has been addressing us, has said everything that can possibly be said in support of the case of his client. He asks, at the end of the three days, for a new trial of the case. In the view which I take of the case many of the questions which have been discussed are quite immaterial, and having regard to the admissions of the plaintiff and the facts, as to which there is no possible doubt in this case, I think that it would be a complete miscarriage of justice if a new trial were ordered.

The way in which the case strikes me is this, and I am not going into it at great length, because in my view the reasons for my decision can be stated very shortly. The case relates to certain pony races which were held at a course at West Malling. They were held because the plaintiff applied to the stewards of the Pony Turf Club for a licence for that course. He writes four days before the meetings take place: "Dear Sir, I have a proposal in reference to a pony race meeting to be held on this place. We have what I think would make an excellent course." He speaks of "I" and "We."

The Pony Turf Club is a comparatively recent institution, somewhat on the lines of the Jockey Club, which deals with the racing of full-sized horses. The Pony Turf Club, under a series of stewards of considerable turf experience

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and of position, attempts to do what the Jockey Club does for racing: to ensure that all races of small horses called ponies (horses under a certain height) should be conducted properly. When a person applies for a licence to hold a meeting he submits himself to the Rules of the Pony Turf Club. He would not be allowed to hold a race meeting unless he were ready to comply with those rules. The Rules of the Pony Turf Club provide that for certain specified offences every person so offending shall be warned off all courses. Rule 170 provides: "The Stewards of the Club may, in their absolute discretion, warn off any person from all courses where these rules are in force without assigning any reason for so doing," that is to say, the person applying for a licence and acting in any capacity directly or indirectly in connection with the meeting submits himself and agrees to submit himself to the jurisdiction of the stewards of the Pony Turf Club.

There has been during the history of this case, considerable obscurity as to who are the persons who run the West Malling racecourse. The plaintiff applied for the licence. He was undoubtedly the clerk of the course at all the meetings. He was an undischarged bankrupt, and his wife appeared to be the owner of the land on which the course was situate. The secretary was his daughter. His brother was to have some share in the profits. Apparently the persons so-to-speak behind the meeting at West Malling were the Cookson family. The meeting was so unsatisfactorily conducted that some eighteen months after the last meeting the prizes had not been paid to the winners in a substantial number of cases, and offers were made of payment, not in cash but in promissory notes. With regard to whether those promissory notes had been accepted, statements of the most unsatisfactory character were made by the plaintiff and other members of his family, and particularly by his brother, to the stewards. The stewards had brought to their attention the fact that this meeting, in the holding of which the Cookson family had taken the parts that I have mentioned, was so unsatisfactorily conducted that the persons who had won the races had not received the advertised prizes. The stewards began by considering the question of the forfeit list, and they passed a resolution that the plaintiff's name should be put in the forfeit list. That becomes immaterial in this case, because there was not a forfeit list. There was technically, under the rules, a forfeit list, but no entry had yet been made in it, so that there was a blank list, and the plaintiff's name was never put in that list. The prizes not having been paid at all, the stewards gave the plaintiff notice that they would hold an inquiry into the general conduct of the West Malling course, and the plaintiff did not find it convenient to attend that meeting. He treated it apparently as a matter of slight importance compared with his going to Portsmouth, and he sent his brother to represent him. The stewards heard what the brother had to say, some of which was quite inaccurate, and in my view it is very doubtful whether it was not quite inaccurate to the knowledge of the brother. I draw very little distinction between the two brothers Cookson. The stewards having heard the brother, and not having heard the plaintiff, because he did not take the trouble to come, decided to warn him off the turf, and they published a warning in the Pony Turf Club Racing Calendar. The rule by which the plaintiff is bound entitled the stewards, in their absolute discretion, to warn off any person from all courses where those rules were in force without assigning any reason for doing so, and the next rule expressly contemplates publication of the warning-off in the Racing Calendar, and indeed one would expect it, because one of the consequences of warning-off is that the person who is warned off cannot train any horses. It is, therefore, obviously desirable that a public notice should be given to all persons likely to read the Racing Calendar that they may not send any horses that they own to be trained by the plaintiff.

Those being the facts, the plaintiff brought an action, and I still have some difficulty in disentangling how much is left in that action. A long statement of claim alleged, both of the first proceeding with regard to the forfeit list and about the second inquiry into the general conduct of the course, that the defendants acted illegally in not giving sufficient notice and proceeded contrary to natural justice. The first relief asked is a declaration "that the plaintiff's name was wrongly placed in the forfeit-list and in the 'warned-off' list." As to the forfeit list, it was never placed in the forfeit list, and consequently that part of the claim goes. I had been under the impression, until I heard Serjeant Sullivan just now, that there was still a contention that the decision to put him in the warned-off list was wrong, because the pleading states that it was illegally done without sufficient notice and as to the forfeit list contrary to natural justice, but Serjeant Sullivan now tells us that he makes no claim under the first head of the declaration.

It is quite clear that the club cases, although I have not looked at all of them, generally proceed on the right of property, that proceedings which deprive the claimant of his property must be carried out according to the rules of natural justice, a phrase which I do not like but which is continually used in the cases. One of the rules of natural justice is that you should give the person whom you are going to affect notice of what is alleged against him and an opportunity of being heard. For that reason the learned judge, as a measure of precaution, asked the jury the first question: "Did the defendants give the plaintiff a reasonable opportunity of answering the charges on which they decided against him?" and the jury answered "Yes." I am quite satisfied that the plaintiff knew quite well that what was being complained of was the non-payment of prizes to winners for eighteen months, and it was because he knew that that was being complained of that he resorted to the expedient of giving promissory notes and making misleading statements to the tribunal as to whether those promissory notes had been accepted in payment, but the whole claim for a declaration seems to have been made under a complete misapprehension of the position. Provided that the matter is within the jurisdiction of the stewards, and if they give the person affected reasonable notice of what he has to answer and an opportunity of being heard, the High Court is not a Court of Appeal from the stewards. Supposing that the High Court thought that the stewards came to a wrong decision, they have no jurisdiction to give effect to their view. The plaintiff has not undertaken to hold meetings subject to the opinion of the High Court on racing matters, a most unsatisfactory tribunal to deal with racing matters. The plaintiff has undertaken to hold meetings subject to the jurisdiction of the stewards of the Pony Turf Club, who do know something about racing matters, whereas the High Court does not. The whole idea of the statement of claim, as regards the declarations, was I think founded on a complete mistake that in some way the High Court would rehear the facts which led

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to the decision of the stewards and form an opinion different from that of the stewards and give effect to it. That, I think, is an entire mistake on the part of the plaintiff and of those who conducted his case.

The first claim for a declaration, therefore, goes for the reasons I have stated, and we are left with the action only as an action of libel. The action of libel is based upon the publication in the Racing Calendar, and the publication in the Racing Calendar is this: "Notice. As a result of an enquiry held by the stewards of the Pony Turf Club, at the Registry Office, on May 4th, 1929, the following person was warned off all courses under their control in accordance with Rule 170—Ernest Sawrey Cookson." Rule 170 is the rule which gives the stewards an absolute discretion without stating their reasons for warning off. That is the libel. It is perfectly obvious that that statement is quite true, every word of it. The stewards did hold an inquiry on the date mentioned, and they did at that inquiry come to a decision that Ernest Sawrey Cookson should be warned off all courses under their control in accordance with rule 170. I am quite aware that it is a defamatory statement to say that a man is warned off. The statement that he is warned off because of his being of an unfit character to be on is obviously defamatory, but the statement is true. He was warned off all courses, and if it is said that it is open to the High Court to investigate whether he was rightly warned off all courses, that is going back to the fallacy which I have explained in connection with the declaration. The High Court is not the tribunal to rehear the decision of the stewards. The plaintiff by applying or a licence and acting as an official at a meeting held under Pony Turf Club Rules, is bound by the rules to accept the decision of the stewards, provided, as I have said, that those proceedings are conducted in accordance with natural justice. From that point of view it has seemed to me all through this case that these questions about innuendoes are quite beside the mark. If you get a true statement and an authority to publish the true statement, it does not matter in the least what people will understand it to mean. The plaintiff has submitted to the jurisdiction. The stewards have authority to publish the decision in the Racing Calendar, and if it is defamatory, it does not matter in the slightest what exact shade of meaning you are to put upon the obviously defamatory statement. That really is the whole point which Serjeant Sullivan has been engaged in putting before us. He says, first of all: The stewards ought not to have published in the Racing Calendar, and, if I follow him, next he says: They ought not to have published it in the Racing Calendar, because the warning-off is generally for some corrupt or fraudulent practice; consequently if they publish it in the Racing Calendar, persons will think that this warning-off is also for some corrupt or fraudulent practice. That argument appears to give no effect to rule 170. The stewards are empowered to warn off and to publish without giving any reason, and if they are empowered to publish without giving any reason, nobody has any right to assume that he has been warned for one particular reason. The stewards have authority at their absolute discretion to warn off without giving any reason. On that ground I have been unable to take any interest, beyond listening to them and endeavouring to understand them, in Serjeant Sullivan's observations about these innuendoes. What happened, however, was this, that the pleader for the plaintiff alleged that the publication in the Racing Calendar meant that "the plaintiff according to rules 16 and 170 of the Rules of Pony Racing, had been guilty of some corrupt or fraudulent practice on the turf, and that the plaintiff had, in fact, been guilty of some corrupt or fraudulent practice on the turf, and that the plaintiff had been guilty of fraud or some other gross crime or that the plaintiff was a man of so bad a character that he was a person who ought to be permanently excluded from all racecourses under recognised rules." Parts of that innuendo were given up during the trial. The allegation about "some other gross crime" was given up and the allegation about "permanently excluded" was also given up; but, as I understand, the suggestion was left that publication in the Racing Calendar means, and would be understood by most people to mean, that the plaintiff had been "guilty of some corrupt or fraudulent practice." The defendants said: "No, it does not necessarily mean that. We may put a notice that he has been warned off in the Racing Calendar, but that warning off may be for all sorts of reasons, some of which are not corrupt and fraudulent practices." The learned judge said this: "Then on that I propose to direct the jury that if they think it means he had been guilty of corrupt and fraudulent practice there is no answer to it"—that, of course, would be so, because there was no allegation that he had been guilty of corrupt or fraudulent practice, and it was not suggested that if it meant that, and reasonably meant that, it was true—"That I put as a separate question which really does not help it—but if they think it meant what Lord Harewood thought it meant, that he was a man whom it was undesirable to have on the turf and unfit to associate with gentlemen of the turf, then they can find it true. In that way I think I am putting the point to them that you want." Serjeant Sullivan is then reported as saying: "It does meet my point, my Lord," and the judge says: "Yes, I think it does." It seems to me that the remark which the judge is said to have made shows that Serjeant Sullivan did say: "It does meet my point." The judge says: "Yes, I think it does." Serjeant Sullivan now suggests, as a trifling amendment, that what he really said was "It does not meet my point," to which statement, if made, I do not under-understand the answer: "Yes, I think it does." However, the judge then left to the jury two questions, into one of which an unfortunate word has strayed. He said: "Did the publication in the Pony Racing Calendar cause the notice set out in para. 11 of the statement of claim to mean only that the plaintiff had been guilty of some corrupt or fraudulent practice on the turf?" and he said before, does it mean that without the word "only." He said secondly: "Were the words in their natural and ordinary meaning true?" and in connection with that he read to the jury the answers given by the witnesses for the defendants, which were to the effect that the statement in the Racing Calendar means that the plaintiff was an unfit and undesirable person to associate with gentlemen of the turf.

I think that the papers which I have before me show quite clearly what happened. When the jury came to consider were the words, in the natural and ordinary meaning, true, and recalled what the judge had said about them, they were not clear what the words were. I am not surprised at that, because in the words in the publication there was nothing about undesirable character or corrupt or fraudulent practices. They came to the judge with this question, which they wrote down: "The jury would like to have the actual words referred to, i.e. are they that the plaintiff was an unfit person to associate with gentlemen of the turf." Of course, those were not the words, and the judge thereupon read to them, and apparently gave them, the Racing Calendar to take with them, with the actual words that the stewards had held an inquiry and had warned Mr. Cookson off the turf. He read to them again the evidence of what the defendants said was the meaning. Thereupon the jury went back and they wrote on their question paper the information that they had just received—namely, "the words quoted in the Racing Calendar"—and they had the Racing Calendar before them—"and the meaning given by the stewards, namely, that the plaintiff is an unfit and undesirable person to associate with gentlemen of the turf." Then, for some reason, they scratched all that out and they wrote, on the second page of the paper: "Question 3." They had struck out Question 3, so that technically there was nothing to show what Question 3 was. The answer is: "Yes," with the reservation by one juryman to this effect, that although the words are true, the warning off was not necessarily justified. All the jury, therefore, agreed that the words were true. One man thinks that although they were true, they did not justify warning off. That is just exactly the thing which the High Court cannot consider. The High Court does not sit as a Court of Appeal to inquire whether the facts proved justify the action of the stewards if they are matters within the conduct of their race meetings. Therefore, that reservation of the juryman was a perfectly irrelevant reservation. As matters then stood they said that the words did not mean—I read them as saying did not mean, though I do not think they give effect to it—that the plaintiff had been guilty of some corrupt or fraudulent practice, but that they did mean that he was an unfit and undesirable person to associate with gentlemen of the turf, and they showed their opinion of the whole action, being asked to find, whatever view they took, the damages that the plaintiff had suffered, and they said: "None; if otherwise, or any"—that is to say, if the judge thinks that there must be some damages—"One farthing." That was the view that the jury took, after having heard the plaintiff cross-examined for some time and having heard the facts that he had admitted, which I have not gone through but which are extremely discreditable to him. That was the view that they took of the case.

Under those circumstances, we are asked to grant a new trial. All I can say is that I entirely agree with the verdict of the jury. I think that the plaintiff was a most unsatisfactory person to have the management of any race meeting. The facts that he admitted, although I am not going through them in detail, show that he was a most unsatisfactory person to have the management of any transaction involving honesty in money matters, and to say that because there has been a difficulty about innuendoes, which in my view are not material to the case, therefore the whole matter should be gone through again with the tolerable certainty that the jury, if they give the plaintiff anything at all, will give him one farthing damages, would be a complete miscarriage of justice. If there was any misdirection of the judge, and I do not think that there was, it comes, in my view, entirely within the power of the Court, in the case of alleged misdirection by the judge, not to grant a new trial if they think that there was no substantial miscarriage of justice; but I do not think myself that there has been any misdirection. I think that a number of immaterial matters were gone into at the trial and

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have been gone into by Serjeant Sullivan in this case. The fact that in some of those immaterial matters there are some difficulties and some inaccuracies does not seem to me to be any reason for interfering with the verdict when what are the true matters before the Court come to be considered. They are, in my opinion, that this Court is not a Court of Appeal from the decision of the stewards on matters within their jurisdiction, and also that it is quite clear that the statement published in the Racing Calendar was a true statement, which must necessarily involve some defamatory meaning, but a statement which, by the action of the plaintiff, the stewards were entitled to publish in the Racing Calendar.

For these reasons, the appeal must be dismissed with costs.

GREER L.J. I agree for two reasons. The first of them is clearly expressed in the first few lines of the second paragraph of Horridge J.'s judgment, which I proceed to quote as expressing my own views in this case: "In my view the publication in the Racing Calendar was necessarily true. They had warned him off, and the publication merely said that they had warned him off. {I do not think it falls within that class of case where it is said that if you repeat a rumour you cannot say it is true by proving that in fact the rumour existed; you have to prove that the subject-matter of the rumour was true.} I think this is rather like the case where you speak of a man having been convicted of a certain criminal offence, in which case I think you would be justified in putting in the conviction; you would not have to re-try the man." In my judgment any one who knows that a man has been convicted of larceny at a criminal trial before a Court of competent jurisdiction is entitled to say, without being sued for slander or libel, that that man has, in fact, been convicted. It seems to me that also in the case where 2 a man submits to a domestic tribunal, any person is entitled to record the fact that that domestic tribunal decided against him. If it is a question relating to a school, and a boy is properly expelled by the competent authority, I think that any one can say, without being sued for slander or libel, that the boy was, in fact, expelled. The same thing would apply to expulsion from a club. When a man subjects himself to a domestic tribunal he must be in exactly the same position as regards complaining of a record of that domestic tribunal as every citizen who has to submit himself to the lawful tribunals of the country. It would, in my judgment, be an extraordinary result of the law of libel and slander that if you said that a properly constituted tribunal had found a man guilty of some wrongful act you could be sued for libel unless you could prove that that properly constituted tribunal had rightly decided that he was guilty.

That, in my judgment, is enough to dispose of this case; but I agree with my Lord that there are other reasons why it would be most unsatisfactory and undesirable, and not right, that there should be an order for a new trial in this case. The plaintiff is a man admittedly with a bad financial history. He said himself, not in these exact words, but in words to this effect, that his financial history was well known in sporting circles. He had been bankrupt three times. When he applied for the licence, and began to act in the management of this course, at any rate as clerk of the course, he was an undischarged bankrupt. His bankruptcies were not of the kind that call for exceptional sympathy for a man who has suffered bankruptcy. Be that as it may, he was a person who, in fact, applied for a licence, and a licence is necessarily a personal matter. When a motor-car is licensed it is not a licence issued for the car itself, but it is a licence to the person who applies for the licence to run a motor-car; and so here, where the licence applied for was to hold races under the jurisdiction of the Pony Turf Club, the application was a personal application on the part of the man who made it. He did not say that he was making it for his wife, or that he was making it for his brother, or for the accountants who audited his accounts; and the Pony Turf Club were justified in supposing that he was asking for the licence for himself, and that he was accepting responsibility for the proper conduct of the race meetings. Now what happened? The first race meeting was a comparative success, that is to say, it was like a budget upon which there was only a small deficit. That is to say, there was not a very large difference between the expenses and the receipts, but the outgoings were greater than the incomings. At the second and third meetings there were serious losses, and notwithstanding altogether inadequate financial backing the plaintiff and those associated with him, decided to go on with their racing. The result was that his position after October, 1927, when the last race of that year was run, was that considerable sums were owed for prizes that had been advertised, and in respect of which there was an undertaking to the winner that they would be paid. In 1928 they applied for licences to run in that year, but they were not granted them. 1929 came, and it was ascertained in March of that year, about eighteen months after the debts had been incurred, that considerable debts had not been paid in respect of the prizes. That is the kind of defalcation that is naturally regarded as most serious by sporting men. In the first place the stewards decided that they would put the plaintiff on the forfeit list until he paid up, or caused to be paid up, the debts that were due in respect of these races, but for some reason or other they thought it desirable to have a more complete inquiry about the matter. They accordingly decided to hold a meeting on March 4, at which, as they informed the plaintiff, they were going to take into consideration the whole conduct of the racing at this West Malling racecourse, and they asked him to appear. He did not appear at the meeting on March 4, but he wrote a letter which, in my judgment, they were justified in thinking contained very serious departures from the truth, to use no stronger term. In order to put a good face on it he and those who were with him responsible for what had happened had tried to substitute for some of the larger debts a different form of debt from the form of debt which existed at the time—namely, a debt on a promissory note for a debt which arose out of the contract to pay the prizes. Hoping, I suppose, that it might be accepted without any further explanation, the plaintiff wrote that the debts had been paid. Some of the creditors had been willing for the time being to accept the promissory notes as if they were payment until such time as they might be dishonoured, but one of them, or the tribunal may have thought, at any rate, that one of them had thought that by accepting the promissory notes no difference was made in the situation at all, and had sent it back, although it does not seem quite clear whether it had come back before the meeting, but it probably had not come back before the letter was written. Under these circumstances the stewards decided, not that the plaintiff should be put on the forfeit list, but that he should be warned off all racecourses under their control. In order to make that effective they had to give notice to every course under their control, and in order to protect those who might be sending horses to be trained by the plaintiff they had to give some kind of general notice. The notice which they gave is in these terms in the Pony Turf Club Racing Calendar: "As a result of an inquiry held by the stewards of the Pony Turf Club, at the Registry Office, on May 4th, 1929, the following person was warned off all courses under their control in accordance with rule 170—Ernest Sawrey Cookson." That is the name of the plaintiff, and any reader of this Calendar was referred, if he liked to look it up, to rule 170, where he would find that the stewards had an absolute discretion to warn off all persons from courses where these rules are in force without assigning any reason for so doing. Therefore all that they would be entitled to suppose that this notice meant would be that, in fact, there had been an inquiry, and that for reasons which seemed adequate to the stewards of the Club they had decided that he should be warned off.

Under those circumstances, the action was brought, and amongst the claims was a claim for damages for libel—it is the only one with which we are now concerned—based upon the publication of this notice. Unfortunately actions for libel have, from time to time, become more and more complicated with technical rules of law with regard to innuendoes, privilege, and all sorts of matters of that kind, and that in a branch of the law which affects almost as much as any branch of law the ordinary average citizen of this country. Of course, if those technical rules of law have been established the Courts have to abide by them until some alteration is made in them which is effective in law. One of the matters about which there are technical rules is the innuendo. An innuendo is required where words in their ordinary meaning are not defamatory. You may, by means of a plea that there are facts and circumstances which show that the words of the alleged libel mean something different from their literal meaning, make out a good cause of action for slander or libel by showing that the circumstances were such that persons to whom they were published might attach to them a defamatory meaning. In this case it was alleged that by innuendo the words used had a defamatory meaning to this effect: "that the plaintiff had, in fact, been guilty of some corrupt or fraudulent practice on the turf, and that the plaintiff had been guilty of fraud, or some other gross crime." That is the first portion of the innuendo. Notwithstanding the view that Horridge J. took as to the words being incapable of having that meaning, he left the question to the jury, and the jury negatived that meaning. Then there was alleged in the innuendo an alternative meaning: "or that the plaintiff was a man of so bad a character that he was a person who ought to be permanently excluded from all racecourses under recognized rules." Serjeant Sullivan, in his vigorous and proper argument for his client, admitted, or said, and it is now accepted, that the word "permanently" must be treated as excluded from this allegation and innuendo, and that it was necessary for him to establish it with that word deleted. I accept that as he so stated it. Then the second portion of the innuendo was this: "that he was a person who ought to be excluded from all racecourses under recognized rules." Many of the witnesses for the defendants admitted that the effect of the publication would mean that he was a person of so bad a character that he was unfit to associate with gentlemen of the turf. For my part, I cannot see any substantial difference between that admission, which was made by Lord Harewood and others in different terms, sometimes a little stronger, and the second portion of the innuendo which was alleged, but I think that, unfortunately, the learned judge treated this meaning as if it was the possible, natural, and ordinary meaning of the words, and did not require to be dealt with as part of the innuendo; but there is one thing perfectly clear, and that is that he was prepared, in order that the trial might not result in the possibility of a new trial, to put that case to the jury. He was also prepared to deal with the pleadings as amended so as to enable the jury to decide, and to determine for the purposes of the action, whether that defamatory allegation was, or was not, true. I think that it is a little unfortunate that the amendment was not made in a clearer way. It is unfortunate that it was not put as a plea that the second portion of the innuendo was true in substance and in fact, but I think that the effect of what the learned judge did was to put the second portion of the innuendo to the jury and to ask them whether that was true. It appears to me from the record of what happened that when the jury were considering the verdict that they must have quite understood that, and that they did give a finding that, in that sense, the allegation that he was an unfit person to associate with gentlemen of the turf was true, and, therefore, that the defendants ought to succeed upon that ground.

I have not concealed from myself the fact that the course the trial took, and the amendment of the pleadings, were a little unfortunate. At the same time I am satisfied beyond peradventure, if I may use the phrase, that justice has been done by the result of this case attained at the trial, and that, so far as this appeal is based on misdirection by the learned judge, I think that the case is met by a decision under Order XXXIX., r. 6, that no substantial wrong has arisen and that there has been no miscarriage of justice. On that second ground also, I think that this appeal should be dismissed.

SLESSER L.J. This claim is founded, or was originally founded, on two grounds of action: First, the declaration that the plaintiff's name was wrongfully placed in the warned-off list—I omit reference to the forfeit list, as that matter was never completed, and it has not been pursued—and, secondly, damages for libel. Both these matters were considered in the Court below, and the jury were asked questions on both matters. However, on appeal Serjeant Sullivan says, as I understand him, that he makes no complaint of the finding of the jury on the declaration sought, that the plaintiff's name was wrongfully placed on the warned-off list, and the first answer that the plaintiff was given a reasonable opportunity of answering the charges on which the stewards decided against him. It is unnecessary, therefore, to say very much on this head; but, speaking for myself, I desire to keep open the question of whether there was any obligation on the Pony Turf Club, or the executive committee, to give the plaintiff in any event an opportunity of being heard and answering the charges. As Serjeant Sullivan has pointed out, and it is a fact, that where a person having a proprietary interest is deprived of that interest as in the case of a club, or a similar society, it is his right that before he suffers his proprietary loss he should be heard, due notice being given to him, and before the committee or the adjudicating body can come to a decision; but I am not at all sure that this is such a case. The plaintiff was in no sense a member of the Pony Turf Club. He had applied for permission to hold races under their rules, and rule 170 gave the stewards power with his knowledge to warn off any person in their absolute discretion from all courses where these rules are in force, without assigning any reason for so doing. It is not at all clear to my mind that as a general proposition he had any right to a hearing in those circumstances, because I am not at all sure that the stewards were acting in a judicial capacity or a quasi-judicial capacity. In *Weinberger* v. *Inglis* (*No.* 2) (1) in the Court of Appeal—and I think, as I read it, there is nothing said in the House of Lords (2) in the case to the contrary—Swinfen Eady L.J., as he then was, dealing with the case of a committee who had a right to re-elect from year to year a person to be a member of the Stock Exchange, said (3) that in his opinion it was "an ordinary act of management and administration by a governing body of an association involving exercise of discretion, but it is not a judicial or quasi-judicial act; and as the committee acted with perfect honesty and good faith, their decision cannot be questioned." However, it is not necessary here to consider that matter, beyond leaving the question open, because, as I have said, Serjeant Sullivan does not attempt to pursue any remedy on that head.

That leaves open only the question of damages for libel. As has been pointed out by my Lords, there can be no question but that the statement that Mr. Ernest Sawrey Cookson was warned off all courses under their control in accordance with rule 170 is true in its natural and ordinary meaning. In *Ware and De Freville, Ld.* v. *Motor Trade Association* (4), an attempt was made in a case where a person had been put on the stop list, to say that the placing of that person on the stop list so that persons were not allowed to trade with him meant, and would be understood to mean, that the plaintiffs had been guilty of unfair dealing and dishonourable conduct in their business, the injured persons carrying on a business in the motor trade, and the words would hold up the plaintiffs to public odium and contempt and so on. Bankes L.J. said (5): "In the absence of evidence that the words complained of would be understood in some other than their ordinary meaning, they are not in my opinion capable of a defamatory meaning." Scrutton L.J. delivered judgment to the same effect.

Can it be here said that in the finding of the jury on the attempt to give the words some meaning other than their ordinary meaning there has been a miscarriage of justice? The admitted innuendoes which are suggested in para. 12 of the statement of claim are, as I read them, two: First, that the plaintiff had been guilty of some corrupt or fraudulent practice on the turf, and that the plaintiff had in fact been guilty of fraud, or some other gross crime. That, I regard, in substance, as the first, or severe innuendo. Then the second one is that the plaintiff was a man of so bad a character that he was a person who ought to be permanently excluded from all race-courses under recognized rules. In substance these innuendoes were put to the jury by the learned judge. In the first place the jury were asked: "Did the publication in the Racing Calendar mean only that the plaintiff

(1) [1918] 1 Ch. 517, 546.
(2) [1919] A. C. 606.
(3) [1918] 1 Ch. 517, 546.
(4) [1921] 3 K. B. 40.
(5) [1921] 3 K. B. 54.

had been guilty of some corrupt or fraudulent practice on the turf ? " That I take to be the first, or what I have called the severe innuendo, which was based, not so much on any evidence given, because the highest evidence of innuendo was that of Sir William Bass to the effect that it might put the plaintiff into the class of the utterly disreputable, but rather upon the argument that as in the past, as a matter of history, as I understand, in associations other than the Pony Turf Club, such as the Jockey Club, persons had only been warned off for corrupt practices, or acts of that nature. Therefore, it must necessarily follow that some people of some class, at any rate, would draw the innuendo that that is what was meant in this particular case, and in effect that question was put to the jury, and the answer of the jury was: "No." The jury negatived the suggestion, and I think it is difficult to see how they could have arrived at any other conclusion, because the statement which had been made in the Racing Calendar did not stop, as has been, perhaps, assumed at some stages of this case, with saying that the plaintiff had been warned off, but it went on in terms to say that he had been warned off in accordance with rule 170. Therefore, there does not seem to me, though I have not to consider the matter, much ground for leaving open rule 167, which deals with various forms of evil practice, seeing that that rule was not the rule under which the stewards purported to act, but rule 170. The learned judge went on to leave the second innuendo pleaded again in substance to the jury, an innuendo which in substance had been admitted by the witnesses for the defendants and by the defendants themselves, to mean that the plaintiff was an unfit and undesirable person to associate with gentlemen of the turf, which is, I think, in substance, the same as the statement of Sir William Bass, that he was put into a class not reputable or disreputable class, or the second pleading that the plaintiff was a man of so bad a character that he was a person who ought to be excluded—I leave out the word "permanently"—from all racecourses under recognized rules. On that suggested innuendo, which is also justified, the jury answered "Yes." Although I have listened with great attention, as I hope I always shall, to the long and complete argument of Serjeant Sullivan, I am unable to see when one looks at the matter as a whole that there is any ground for complaint in this matter at all. The jury have found that the words mean, not in their natural meaning, but in the innuendo, which is conceded, that the plaintiff was an unfit and undesirable person to associate with gentlemen of the turf, and that they mean no more and no less ; and they, secondly, have found, attaching that meaning, that what the defendants have said is true. Speaking for myself, I agree with what I understand to be my Lord's opinion, that when one considers the history of this case, the reckless way in which the plaintiff applied for his licence, the way in which there was no money, apparently, at the time, obviously forthcoming to meet the liabilities which he was bound to incur at some stage or another when races were run, the jury were doing nothing very unreasonable in coming to the conclusion that the Pony Turf Club in the protection of pony racing were entitled to say that he was an unfit and undesirable person to associate with gentlemen of the turf. However that may be, that is not a matter for us, but a matter for the jury, on which they were fully and properly directed. I do agree with what Greer L.J. has said, that there did appear to arise some confusion between the natural and proper meaning of the words, which are obviously.

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and must be, true, and the question of the innuendo that he was an unfit and undesirable person. That is miles away from suggesting that there has been any miscarriage of justice here. The only miscarriage of justice that could possibly arise would be owing to that matter which did not affect the result at all, but was perfectly clear, if a new trial were to be ordered.

I agree that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Edmond O'Connor & Co.; William Easton & Sons; T. J. Robinson & Son.*

W. I. C.

C. A.
1932
April 13.

In re DIGBY AND PENNY.

Landlord and Tenant—Agricultural Holding—Notice to quit—Statement of Reasons—" In accordance with s. 12, sub-s. 1 "—Disturbance—Claim for Compensation—Sufficiency of Notice—Agricultural Holdings Act, 1923 (13 *&* 14 *Geo.* 5, *c.* 9), *s.* 12, *sub-s.* 1.

By s. 12, sub-s. 1, of the Agricultural Holdings Act, 1923, where the tenancy of a holding terminates by reason of a notice to quit given by the landlord, and in consequence of the notice the tenant quits the holding, compensation for the disturbance is payable by the landlord to the tenant, unless (among other exonerating reasons) the tenant "(*a*) was not at the date of the notice cultivating the holding according to the rules of good husbandry; or (*b*) had, at the date of the notice, failed to comply within a reasonable time with any notice in writing by the landlord served on him requiring him to pay any rent due in respect of the holding or to remedy any breach being a breach which was capable of being remedied of any term or condition of the tenancy consistent with good husbandry"; and unless the notice to quit states that it is given for one or more of the exonerating reasons above referred to.

The landlord of a holding served on the tenant notice to quit in the following form: "In accordance with s. 12, sub-s. 1 (*a*) and (*b*), of the Agricultural Holdings Act, 1923, we hereby as agents for" the landlord "give you notice to quit," etc. The tenant, in accordance with this notice having quitted the holding, claimed compensation for disturbance, contending that the notice did not sufficiently state that it was given for any of the reasons specified in s. 12, sub-s. 1, of the Act, or did not specify for which of those reasons it was given.

Upon a case stated under Sch. II. of the Act:—

Held, that the notice to quit sufficiently stated that it was given for the reasons indicated in s. 12, sub-s. 1 (*a*) and (*b*), and was an effective notice to bar the tenant's claim to compensation if the allegations were sustained.

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DIGBY AND PENNY, *In re.*

APPEAL from the decision of the judge of the county court of Somerset holden at Yeovil upon a special case stated under Sch. II. of the Agricultural Holdings Act, 1923.

The special case was stated in order to raise the question whether the notice to quit given by the landlord was a sufficient notice to bar the tenant's claim to compensation, before the facts which, if proved, would disentitle the tenant were considered. It was as follows:—

1. Under a tenancy agreement dated May 10, 1923, and made between Frederick James Bosworth Digby Wingfield Digby (hereinafter called "the landlord") of the one part and Arthur Richard Penny (hereinafter called "the tenant") of the other part, the tenant became the tenant of a farm known as North Wootton Farm in the parish of North Wootton in the county of Dorset on a yearly Michaelmas tenancy.

2. A year's notice to quit was served on the tenant on September 27, 1930, by Messrs. Rawlence & Squarey as agents for the landlord in the following form: "To Mr. A. R. Penny. In accordance with s. 12, sub-s. 1 (*a*) and (*b*), of the Agricultural Holdings Act, 1923 (1), we do hereby as agents for and on

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(1) Agricultural Holdings Act, 1923, s. 12, sub-s. 1: "Where the tenancy of a holding terminates by reason of a notice to quit given by the landlord, and in consequence of such notice the tenant quits the holding, then, unless the tenant—

(*a*) was not at the date of the notice cultivating the holding according to the rules of good husbandry; or

(*b*) had, at the date of the notice, failed to comply within a reasonable time with any notice in writing by the landlord served on him requiring him to pay any rent due in respect of the holding or to remedy any breach being a breach which was capable of being remedied of any term or condition of the tenancy consistent with good husbandry; or

(*c*) had, at the date of the notice, materially prejudiced the interests of the landlord by committing a breach which was not capable of being remedied of any term or condition of the tenancy consistent with good husbandry; or

(*d*) was at the date of the notice a person who had become bankrupt or compounded with his creditors; or

(*e*) has, on or after January 1, 1921, refused, or within a reasonable time failed, to agree to a demand made to him in writing by the landlord for arbitration under this Act as to the rent to be paid for the holding as from the next ensuing date at which the tenancy could have been behalf of" the landlord "give you notice to quit and deliver up possession of the farm lands and premises situated in the parish of North Wootton in the county of Dorset now in your occupation on September 29, 1931, or at the expiration of the year of your tenancy which shall expire next after the end of one year from the service of this notice. Dated this 27th day of September, 1930."

3. In pursuance of the said notice the tenant quitted the farm.

4. The tenant duly made a claim for compensation for disturbance, the due receipt of which is admitted by the landlord.

5. It is contended on behalf of the landlord that the form of notice to quit as served complies with the requirements of s. 12 of the said Act in stating the reasons for which it is given—namely, (*a*) that the tenant was not cultivating the holding according to the rules of good husbandry; (*b*) that the tenant at the date of the notice had failed to comply within a reasonable time with a notice in writing by the landlord served on him to pay any rent due in respect of the holding or to remedy any breach being a breach which was capable of being remedied of any term or condition of the tenancy consistent with good husbandry; and that under that section the tenant's claim for compensation is barred if these reasons can be substantiated.

6. It is contended on behalf of the tenant that the form of notice to quit is not sufficiently in compliance with s. 12 of the said Act to debar the claim for compensation for disturbance made by him, in that it does not state that it is given for one or more of the reasons set out in that section.

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terminated by notice to quit given by the landlord at the date of the said demand; or

(*f*) had, at the date of the notices unreasonably refused, or within a reasonable time failed, to, comply with a demand made to him in writing by the landlord requiring him to execute at the expense of the landlord an agreement setting out the existing terms of the tenancy;

and unless the notice to quit states that it is given for one or more of the reasons aforesaid, compensation for the disturbance shall be payable by the landlord to the tenant in accordance with the provisions of this section: Provided, etc."

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The question for the opinion of the Court is whether the contention of the landlord or that of the tenant as stated herein is the correct one. Signed, etc.

The county court judge held that the contention of the tenant was right—namely, that the form of the notice to quit was not sufficiently in compliance with s. 12 of the Act of 1923 to bar the claim for compensation for disturbance made by him, in that it did not state that it was given for one or more of the reasons set out in that section.

The landlord appealed.

Monckton K.C. and *W. M. Walker* for the appellant.

J. L. Pratt for the respondent.

The arguments of counsel sufficiently appear from the judgments.

SCRUTTON L.J. This appeal raises a short point. The Agricultural Holdings Act, 1923, provides that when a landlord turns out a tenant he must pay him compensation for disturbance; but he need not do so if he gives the tenant notice to quit for any of the six reasons mentioned in s. 12, sub-s. 1, of the Act. If, however, the landlord wishes to avoid paying compensation he must see that the notice to quit states that it is given for one or more of those reasons. The question is whether the notice given in this case sufficiently stated that it was given for one or more of those reasons. It is in these words: "In accordance with s. 12, sub-s. 1 (*a*) and (*b*), of the Agricultural Holdings Act, 1923, we give you notice to quit and deliver up possession of the farm lands," etc. The reason mentioned in s. 12, sub-s. 1 (*a*), is that the tenant was not at the date of the notice cultivating the holding according to the rules of good husbandry; the reason mentioned in sub-s. 1 (*b*) is that the tenant had, at the date of the notice, failed to comply within a reasonable time with any notice in writing by the landlord served on him requiring him to pay any rent due in respect of the holding or to remedy any breach being a breach which was capable of being remedied of any term or condition of the tenancy consistent with good husbandry. If the notice to quit had set out in those words the reasons why it was being given, Mr. Pratt concedes that no objection could have been taken to the form of the notice, although it did not give particulars of any breaches of obligation to conform to the rules of good husbandry. Moreover when the Act intends that particulars shall be given it expresses that intention, as, for example, in s. 16, sub-s. 2. If a notice requiring the tenant to quit for the reason that he was not at the date of the notice cultivating the holding according to the rules of good husbandry would be a good notice, as I think it would, then a notice to quit for the reason given in s. 12, sub-s. 1 (*a*), of the Agricultural Holdings Act, 1923, is a good notice, because the two forms import the same thing. The county court judge held that the notice was bad in that it was not sufficiently definite, and that the tenant could not be supposed to know the terms of s. 12 of the Act. I cannot take that view. In my opinion there is nothing unreasonable in supposing that the tenant was acquainted with the terms of the statute under which he held his farm. I can see no substantial difference between "I give you notice to quit in accordance with s. 12, sub-s. 1 (*a*), of the Agricultural Holdings Act" and "I give you notice to quit for the reason given in s. 12, sub-s. 1 (*a*), of the Agricultural Holdings Act, which is that at the date hereof you are not cultivating the holding according to the rules of good husbandry." The case does not admit of much argument. In my opinion the notice to quit was good enough, but its form was somewhat provocative, and landlords who use it cannot have the costs of upholding it. But the appeal must be allowed.

GREER L.J. I am of the same opinion. An agreement in writing between a landlord and a tenant is like other written contracts in this respect, that its terms are to be found in the document and any Act of Parliament which modifies the contract. It is not unreasonable to treat landlords and tenants as persons who ought to know what the terms of their contract are, whether they are contained in a lease or in a statute. If the landlord is under an obligation to specify a matter of which he complains, and the matter consists of the breach of a clause in the agreement, it would be enough for the landlord to say: "You have broken clause x of our agreement"; in the same way it is enough to exclude the landlord's liability to pay compensation for disturbance under s. 12 of the Act if he says: "I give you notice to quit for the reasons stated in sub-s. 1 (*a*) and (*b*) of s. 12 of the Agricultural Holdings Act, 1923."

Slesser L.J. I agree, and have nothing to add.

Appeal allowed.

Solicitors for appellant: *Dawson & Co., for Ffooks & Grimley, Sherborne.*

Solicitors for respondent: *Bridgman & Co., for Lock, Reed & Lock, Dorchester.*

W. H. G.

Applied. BEST *v.* SAMUEL FOX & CO., LTD. [1950] 2 All E.R. 798.

PLACE *v.* SEARLE.

K. B. D.
1932
March 11, 23.
C. A.
May 5, 6.

[1931. P. 59.]

Husband and Wife—Enticement of Wife—Husband's Right of Action.

A wife owes the duty to her husband to reside and consort with him, and any one who, without justification, procures, entices or persuades her to violate this duty commits a wrong towards the husband for which he is entitled to recover damages. In order to succeed in such an action the husband need not prove that the will of the wife was overborne by the stronger will of the defendant.

Winsmore v. *Greenbank* (1745) Willes, 577 followed.

Sanderson v. *Hudson*, The Times Newspaper, January 29, 1923, disapproved.

Decision of McCardie J. reversed.

FURTHER CONSIDERATION of an action tried by McCardie J. and a jury.

In this action John Dover Place, a grocer's assistant at a shop in Cambridge, claimed damages against Charles Searle, a doctor of medicine practising in the same city, for enticing away from him his wife, Gwendoline Elsie Place.

The defendant, by his defence, denied this, and said that if Mrs. Place left her husband, she did so on her own initiative and without any inducement or enticement on his part.

The action was heard at Cambridge Assizes and the jury disagreed. His Lordship adjourned the case to London for further consideration and argument upon the question whether there was evidence to go to the jury. The facts and arguments appear fully in the judgment of McCardie J.

Martin O'Connor (*M. O'Sullivan* with him) for the plaintiff.

G. O. Slade for the defendant.

March 23. MCCARDIE J. read the following judgment: This action was tried before a jury and myself at the Cambridge Assizes in January last. The hearing occupied two whole days. At the close of the plaintiff's case I felt grave doubt as to whether there was evidence on which the jury could find a verdict for the plaintiff. I thought it better, however, not to rule then on the submission of the defendant's counsel that the case should be withdrawn from the jury. I reserved the point till the conclusion of the whole hearing. I deemed it better that the jury should be at liberty to give a verdict. If that verdict was in favour of the defendant then the submission of his counsel became immaterial. If, however, the verdict should be in favour of the plaintiff it would still be my duty to consider the point raised by the defendant: see *Skeate* v. *Slaters, Ld.* (1) The defendant and his witnesses gave their evidence and were fully cross-examined. That evidence was directly adverse to the plaintiff's claim. The jury, after a long retirement, were unable to agree. I then, at the request of counsel on both sides, adjourned the matter to London for further consideration. I have since had the advantage of full arguments and of a close analysis of the testimony given at Cambridge. A decision must now be given on the point reserved. The action involves several technical legal considerations. It does not turn on prejudice or sympathy or social outlook. In substance the question is whether there was evidence on which the jury could properly and fairly find a verdict for the plaintiff on the cause of action alleged by him: see per Curiam in *Ryder* v. *Wombwell* (2), and per Lord Finlay in *Everett* v. *Griffiths.* (3)

The case was exceptional. It raised in somewhat acute fashion several problems of matrimonial and social life. Not only was it an action of a type which is but rarely before the Courts, but the facts in themselves were remarkable. The plaintiff was a grocer's assistant at Cambridge. His wife took in lodgers at the house in which she resided with him. She, and not the husband, was the tenant of the house. The defendant was a medical man in the same town. The action was based on the allegation that the defendant had "enticed and persuaded away" the plaintiff's wife whereby the plaintiff was deprived of her company and society and had suffered loss. The alleged "enticement" took place (if at

(1) [1914] 2 K. B. 429.
(2) (1868) L. R. 4 Ex. 32.
(3) [1921] 1 A. C. 631, 668.

all) shortly after the midnight of July 11, 1931. There was no allegation and no suggestion of any prior "enticement or persuasion." The alleged "enticement," moreover, occurred (if at all) within the space of a second of time, and was effected by the use of not more than six words—namely, "Come on, Gwen. We will go." The defendant denied any enticement or persuasion and asserted that the wife left her husband's house of her own free will and initiative. I may incidentally mention here that the plaintiff stated in his evidence, when cross-examined, that he did not ask the jury to award him damages, except perhaps nominal damages. If this assertion on oath was true, then the plaintiff can ask that he be freed from the accusation of blackmail as the object of the action. But it still leaves him open to the equally grave suggestion that he commenced the litigation for the purpose of destroying, so far as possible, the reputation and the practice of the defendant. Such an action as the present (coupled with a certain allegation in the correspondence) could scarcely lead to a restoration of the plaintiff's matrimonial life. Before I deal with the material facts of the case it seems desirable to consider the law applicable to the matter. The present form of action rests in substance on the case of *Winsmore* v. *Greenbank* (1), where it was held that a person who "enticed or persuaded away" a man's wife committed an actionable wrong against the husband. The same rule was applied against a person who "harboured" a wife after notice that she was absenting herself from the husband without his approval. It is important to remember that in 1745 the position of a wife was wholly different from that which she holds to-day. Broadly speaking, it was the view of lawyers and of the law in the middle of the eighteenth century that the property of a woman became her husband's on marriage that her body belonged to him, that he could restrain her liberty at his pleasure, and that he could administer physical correction at his discretion, subject, of course, to the rule of moderation. The law was concisely stated in Bacon's Abridgment in these words: "The husband hath by law power and dominion over his wife." She was his creature and his possession. She was debarred from the suffrage. She was excluded from the professions. She was restricted and controlled in many ways. To-day, I suppose, it must be taken to be the law that an action for "enticement" still lies, although the position of a married woman has undergone a revolutionary change. Under the Married Women's Property Acts her property is now her own. She can exclude her husband from enjoying any part of it. It is recognized that her body is not her husband's, but her own. The husband cannot restrain her physical liberty. He cannot administer any physical punishment. Her freedom of occupation cannot be restricted by him. All professions (save the ecclesiastical) are open to her. She possesses full political rights. The Sex Disqualification Removal Act, 1919, is significant in the breadth of its implications. By virtue of the Matrimonial Causes Act, 1884, no decree for the restitution of conjugal rights can be enforced by attachment, with the result that neither husband nor wife can force the other to return to conjugal association. The famous decision in *Reg.* v. *Jackson* (1) was weighty in its significance. The contention of the husband in that case was put in the following words when seeking to justify the imprisonment of his wife: "That he, therefore, took his said wife and had since detained her in his house, using no more force or restraint than was necessary to take her or prevent her returning to her relations; that she had perfect liberty in the full run of the house, short of leaving it; and . . . . that he could lawfully use such restraint in order to have an opportunity of regaining the affection of his wife, which had become alienated from him." Such was the carefully framed contention of the husband. Put into blunt words, it meant that the husband claimed to be the custodian and gaoler of his wife's body with all that those words imply in the way of control. The contention of the husband was rejected emphatically by a powerful Court of Appeal. From the date of their decision the shackles of servitude fell from the limbs of married women and they were free to come and go at their own will. Their high moral obligation, as wives, remained and their social obligations were unimpaired, but their physical freedom of movement was recognized and established by the law.

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(1) Willes, 577.

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(1) [1891] 1 Q. B. 671, 672.

I am not concerned to-day with any question of ethics. Every good woman must wish to fulfil, if possible, her duties as a wife. But it seems clear that in law a married woman is free to depart when she wishes from her husband's house. He cannot prevent her from doing so and the law disclaims the power to do so. How, then, does the old case of *Winsmore* v. *Greenbank* (1), decided nearly two hundred years ago, stand at the present day? The answer seems to be that it can only be recognized as good law when read subject to modern legislation and modern binding decisions which establish the freedom of wives at the present day. In *Philp* v. *Squire* (2) (a case of alleged harbouring after notice that a wife was absent without her husband's consent), it was held by Lord Kenyon that it would be a lawful excuse if the defendant proved that he acted from motives of humanity. In *Berthon* v. *Cartwright* (3) Lord Kenyon followed his earlier ruling. There seems to be no reported case between 1796 and 1904. In 1904, however, the case of *Smith* v. *Kaye* (4) was tried before R. S. Wright J. and a jury at the Leicester assizes. The learned judge in that case recognized, I gather, the vast change effected in the position of married women, and hence he told the jury, in his summing-up, that the defendants would not be liable for the mere giving of advice to the wife whereby she left her husband against his will. I confess that I myself might find it difficult to distinguish between "persuasion" on the one hand and aptly worded "advice" on the other hand. It seems to me, if I may respectfully say so, that the first real recognition of the changed status of married women was made by Darling J., as he then was, in *Sanderson* v. *Hudson*. (5) He there pointed out that the old authorities as to mere

(1) Willes, 577.
(2) (1791) Peake, 114.
(3) (1796) 2 Esp. 480.
(4) (1904) 20 Times L. R. 261.
(5) Times Newspaper, January 29, 1923.

harbouring could not apply in view of the altered position of wives. He further said that, in order to succeed in an action for enticement, a plaintiff must prove that the wife had been induced to do that which she would not have done voluntarily; that she had, in a real and effective manner, been induced and persuaded to leave her husband, and that (in substance) her will had been overborne by the stronger will of the defendant. In view of the position of married women to-day, with a full freedom of movement to and from their husbands' abodes, I know not how cases of "enticement" are now to be supported at all unless the view of Lord Darling be accepted as sound. It seems to me to be in substantial conformity with the opinion of R. S. Wright J. in *Smith* v. *Kaye* (1), already cited. I have referred to the freedom of married women at the present day of choosing their own occupations or professions. I point out that "enticement" may operate with equal force in law whether the period of time in question be a year, a month, or a day. Let me now give an illustration to show the serious difficulty of reconciling the old law with modern conditions. A wife desires to take a position as the manageress of a business at a salary of 200*l*. a year. She deems it her duty to supplement the income of her husband and herself for the benefit of the children. The husband strongly objects to the desire of the wife. He prefers that she shall stay at home in order to discharge her domestic duties. The wife goes to the proposed employer and tells him of her husband's strong objection. The employer says to her: "Do not obey your husband's wish, but enter my employment and I will make your salary 250*l*. a year." The wife, thereupon. yields to the persuasion and decides to disregard her husband and to make her own income. She enters on her occupation and spends every week-day, from nine to seven o'clock, in the service of the employer. Is that employer liable to an action for enticement at the suit of the husband? If "Yes," then I know not how the old law is to be reconciled with the independence which the modern law has given to married

(1) 20 Times L. R. 261.

women. If "No," then I see not how the principle asserted in the present action can have any practical validity at the present time. Many other and, perhaps, still more forcible illustrations will occur to the lawyer who possesses sociological vision. The fact is that many of the old decisions require adjustment, if not abolition, in view of the conditions of modern life. It should always be remembered that the action for "enticement" is wholly independent of sexually immoral factors.

In the course of his argument the learned counsel for the plaintiff suggested that such an action as the present rested on the same footing as that which lies for knowingly procuring a breach of contract. He submitted that the marriage ceremony carried with it an imperative and permanent contract between husband and wife for the full performance of their respective matrimonial obligations, and that anyone who knowingly induced a wife (or husband) to break those obligations was guilty of tort. He referred to such cases as *Lumley* v. *Gye* (1) and *South Wales Miners Federation* v. *Glamorgan Coal Co., Ld.* (2) I cannot think that that submission is sound. No action will lie by husband against wife for breach of contract by her through failure to discharge her domestic duties. No action will lie by wife against husband for breach of contract by him through failure to fulfil his duties as husband. I do not, therefore, see how the principle of *Lumley* v. *Gye* (1) and the like cases can apply. If indeed such a principle was ever held to be applicable a new vista of litigation would be revealed. It would mean, for example, that whenever relatives, whether male or female, persuaded a wife to spend a week-end with them, knowing it to be against the will of the husband, they would be liable to an action for wilfully procuring a breach of contract. I conceive that the action for enticement, if it possesses any considered or utilitarian basis at all, must rest on the proposition that the status of a wife is still similar to the status of children who reside with their parents, and with respect to whom actions can be brought by the parents

(1) (1853) 2 E. & B. 216. (2) [1905] A. C. 239.

for seduction, abduction, personal injuries, and the like: see Pollock on Torts, 13th ed., pp. 232 to 235; Salmond on Torts, 5th ed., pp. 448, 456 and 457; Clerk and Lindsell on Torts, 8th ed., p. 209; Lush on Husband and Wife, 3rd ed., pp. 3 and 4; and *Evans* v. *Walton*. (1) I may perhaps permit myself here to say that whatever may be the true basis of actions of enticement it seems clear that, unless carefully watched and checked by the Courts, they may easily develop into recognized methods of wrongful pressure and improper extortion.

I have said enough, I hope, to show the curious state of the law at the present time. I will now turn to the facts of this case. Into the history of the matter prior to July 11, 1931, I need go but briefly. The plaintiff and his wife married in 1919. They have one child named Celia, aged about eleven. Unhappiness began soon after the marriage, and the unhappiness steadily deepened. The wife, at the trial, complained of her husband's conduct in many respects. I summarize the heads of her charges against him: (1.) that he slept with a revolver under his pillow at night and kept telling her as she lay beside him that it was loaded and ready; (2.) that he threatened to assault her; (3.) that he often abused her; (4.) that he was cruel to the child; (5.) that he deliberately ill-treated a favourite dog in her presence; (6.) that he destroyed her dresses; (7.) that he failed to make her a sufficient allowance; (8.) that he often borrowed money from her for the purpose of visits, by himself, to the public-house or the cinema; (9.) that on a number of occasions he would not speak to her for nearly a week at a time; and (10.) that he was often under the influence of drink. Broadly speaking, the husband denied the substance of these allegations, save that he admitted the possession of the revolver, admitted that he had borrowed money from her for the purposes above named, and that on some occasions he had refused to speak to her at all for two or three days. It is obvious that, so far as material, the truth or otherwise of the above matters would be for the jury and not for the judge to consider in connection with the other facts of the case. They obviously bore upon the question whether or not the wife had formed a wish to leave her husband prior to July 11, 1931. I do not deal with them further, because the defendant did not expressly raise the point that he would have been justified on humanitarian grounds in persuading the wife to leave the husband. That such a defence might have been expressly raised seems clear from the cases I have already mentioned. The defendant's case rested on the contention that he did not in fact persuade or entice the wife to leave, and that there was no evidence that he did so. As against the defendant and on another aspect of the matter, it was admitted in the course of the case that the defendant had been on terms of friendship with the wife for several years before 1931, that he had made her gifts of flowers and fruit and game, that he had provided a horse for her from time to time so that they could ride together, that he had taken her for long drives in his motor-car, that he had entertained her to dinner on different occasions at hotels twenty miles or more from Cambridge, that he had taught her to shoot, and that he and she had shot together at a small rough shooting rented by the defendant some miles from Cambridge. It was not and could not be disputed that as to some of those matters, at all events, the husband was in a state of ignorance. Hence the jury or some of them might naturally and justly take an adverse view of the defendant's conduct prior to July 11, 1931. Concealment is the fertile parent of suspicion, and suspicion often leads to accusations that are not well grounded. Whatever be the right of a wife to choose her own friends and her own amusements, she and her friends cannot complain if concealment is sometimes followed by suspicion. It is only just to point out here in the clearest way that there was no allegation of adultery against the defendant nor was there the slightest evidence of it. There was not the suggestion of a caress or a kiss or even of an affectionate letter or word as between the defendant and the plaintiff's wife. It was expressly admitted, moreover, by the plaintiff that he himself had personally watched for over a year, and that he had never seen or found anything whatever of a suspicious nature. The case is, indeed, a remarkable one in many ways. Before I turn to the events of July 11 and July 12, I should mention one important fact. Not even the vigorous counsel for the plaintiff ventured to suggest that the plaintiff's wife was a woman of weak will. She was seen by the jury. She was fully examined and cross-examined as to the matters I have mentioned and as to her rowing, riding, and shooting. There could be no doubt whatever (and indeed it was admitted from the first) that she was a woman of resolute will, of independent decision, and of strong mind and physique.

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(1) (1867) L. R. 2 C. P. 615.

I will now deal as briefly as possible with the events of July 11 and July 12. Amongst the lodgers at the plaintiff's house was a Mr. Aurousseau. He was admittedly well disposed to the plaintiff. He was admittedly antagonistic towards the wife, to whom he had owed 20*l*. for his board and lodging. His evidence has a direct bearing on the case. On the night of July 11 the plaintiff had been drinking at the "Rose and Crown" public-house till about closing time. Shortly afterwards he went to his house. He there saw Aurousseau, who made a statement to him. It is clear from the evidence of the two men that in substance Aurousseau's statement amounted to an accusation of adultery against the plaintiff's wife and the defendant. The plaintiff was already excited by his visit to the "Rose and Crown." After hearing what Aurousseau said he fell into a state of anger and frenzy. From this point onwards some matters are in dispute and some are not. I will state only the matters admitted by the plaintiff or his witnesses or his counsel. After hearing the statement of Aurousseau he went to his wife's bedroom. He charged her with adultery. He told her to get up. She left her bed, put on a dressing-gown and came downstairs. The plaintiff went out to telephone to the defendant. It was about midnight. The defendant was in bed. The plaintiff asked the defendant to come round and discuss matters. The defendant refused to leave his bed. The plaintiff returned to his house. Later on he telephoned again to the defendant, who said that if the plaintiff wished to see him he must come round to his, the defendant's, house. Meanwhile the plaintiff had talked to his wife. He admits that he said: "I feel as though I could run a knife through you." He also admits that a sharp hunting-knife was close at hand. The wife then ran out of the house, saying that she would not stay in it a moment longer. She telephoned to the defendant, and shortly afterwards the defendant dressed, got his motor-car, and met the wife outside the house. Both the defendant and the wife then entered the plaintiff's house together. The defendant had admittedly brought her back to see the plaintiff. Conversations then took place between the defendant and the wife and Aurousseau, the terms of which are in dispute. There is, however, no suggestion throughout that the defendant said anything to the wife to induce her to leave the house. Soon afterwards the plaintiff came back to the house and saw his wife and the defendant and Aurousseau together. What was then actually said is, of course, in dispute, but I point out again that there is no suggestion that the defendant then said anything to the wife to persuade her to leave the plaintiff. The plaintiff then invited the defendant to fight him. The fight took place. The plaintiff was defeated. Mr. Aurousseau then separated the two men while still struggling together. Such was the state of affairs when the alleged "enticement" took place. The plaintiff was admittedly a man of very emotional and excitable temperament. He was in a state of fury, because he believed that his wife had committed adultery. He had said that he felt as if he could "run a knife through her." He had fought the defendant and been defeated. The object of the defendant in bringing back the wife to the house had failed. The plaintiff had not accepted any explanation or denial. The position as between husband and wife was far worse rather than better. As Mr. Aurousseau put it: "The defendant apparently thought it was useless for the wife to stay any longer in the house." The defendant then took the wife's arm and said: "Come on, Gwen. We will go."

Mr. Aurousseau then opened the front door for them, and the defendant escorted the wife to his motor-car and at once took her (as is admitted) to spend the rest of the night with one of the wife's old family friends. When the wife left the house she had nothing on save a dressing-gown, over which was thrown a waterproof which Aurousseau had handed to her in the plaintiff's presence. The plaintiff said nothing and did nothing to prevent his wife's departure. He said that he was too exhausted to do anything, but he certainly was not too exhausted to speak. And so the wife left the husband's house at shortly before one o'clock in the early morning of July 12. Within a few days she sent message after message to the plaintiff asking to see him. The plaintiff, however, refused to see her or communicate with her in any way, and by his solicitors' letter a few days later he charged her with adultery, though admittedly there was no evidence at all to support that accusation. The attitude of the plaintiff was well shown by the evidence of Mr. Aurousseau, who stated that when the plaintiff was told of his wife's messages to him, he replied: "I will see nobody; I will discuss nothing."

Now, was there evidence here to go to the jury that the defendant had enticed and persuaded the wife to leave the plaintiff on the early morning of July 12? Let me repeat that the alleged enticement was comprised in six words only, spoken by the defendant to the wife, admittedly a woman of strong will, in the presence not only of the plaintiff himself but also in the presence of his friend Aurousseau. If there is here sufficient evidence for the jury, then the door will indeed be opened wide to litigation of an undesirable and perhaps dangerous character. There were no words of persuasion, no words of enticement, not even words of advice —merely the words: "Come on, Gwen. We will go." In what way can it properly be said that the wish and will of the wife was overborne? The six words in question must be viewed in the light of the surrounding circumstances as disclosed by the plaintiff's own case. I may mention here that in fact the evidence of the defendant and the wife and other witnesses for the defence most strongly negatived instead of supporting the plaintiff's allegation of enticement and persuasion. If the defendant had desired to take away the wife by enticement and persuasion he could have driven her away with him in his motor-car when he first met her that night outside the plaintiff's house. Instead of doing that he took her back to the plaintiff's house for the purpose, obviously, of seeking to patch up matters between husband and wife. The wife had already left the house of her own will. It was the defendant who led her back to the house to see the husband. The events then took place which I have already described. It seems to me that the only inference on the whole of the above circumstances is that, when the defendant said: "Come on, Gwen. We will go," he merely recognized the obvious fact that it was useless further to oppose the wife's intention to leave her husband. So far from the circumstances tending to show that it was the defendant's wish to induce the wife to leave the house against her own desire, they tend most strongly and indeed inevitably to the opposite conclusion. No circumstances could have been more embarrassing to the defendant than the departure of the wife at such an hour in her night-clothes and without taking with her even a single article that a woman usually needs. Any one familiar with the world and human nature will realize the reluctance with which the defendant recognized that it had become useless in view of what had happened to further oppose the intention of the wife to leave. I myself think it clear that the defendant was amply justified in his view that the time had come when the wife should carry out her own intention of quitting the house, at least for the night. If the defendant had gone away without her he would have left her not with Mr. Aurousseau (who admittedly did not wish to take any further part in the difference between husband and wife), but with a husband who possessed a revolver and a hunting-knife, who believed his wife had committed adultery, who was in a frenzy of anger, who had already stated that he could run a knife through her and who might, when alone with her, have inflicted on her the gravest physical injury. It seems clear that if the defendant

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had not been at the house at all the wife would have refused to stay with her husband. Whatever may have been the faults of the defendant prior to July 11, no one I think would doubt his wisdom in recognizing that the wife was right in wishing to depart from the house rather than be left with her husband under such dangerous conditions.

I hold that there was no evidence on which the jury could find in favour of the plaintiff in respect of the cause of action alleged. I am not concerned with any question of matrimonial ethics or of social morality. I have to deal with a technical question of law, and my decision on the point involves no approval of the conduct of the defendant or the wife prior to July 11. Still less does it involve any approval of several aspects of the plaintiff's own conduct.

I should like to add three things, in view of several questions raised in the speeches or arguments of counsel. Firstly, it seems to be clear that the position as between husbands and wives and third parties calls for reconsideration by the law in view of the new status of married women. Secondly, the rights of a married woman to form her independent friendships and enjoy her own amusements can never be solved by the law but must be determined by the standards of loyalty, of courtesy, and of good sense; and, thirdly, that the comfort and happiness of married life rest not on statutes or decisions but on matters that lie beyond and above the realm of law.

I must enter judgment for the defendant with costs.

Judgment for defendant.

F. P .F.

The plaintiff appealed. The appeal was heard on May 5 and 6, 1932.

Martin O'Connor (*M. O'Sullivan* with him) for the appellant. *Winsmore* v. *Greenbank* (1), in which it was held to be an actionable wrong for a defendant unlawfully and unjustly to persuade, procure and entice the husband's wife to leave him, is still good law. It was approved by Mathew J. in advising the House of Lords in *Allen* v. *Flood* (1), and in the same case Lord Watson said (2): "Any invasion of the civil rights of another person is in itself a legal wrong, carrying with it liability to repair its necessary or natural consequences, in so far as these are injurious to the person whose right is infringed." Lord Herschell, also in *Allen* v. *Flood* (3), treated *Winsmore* v. *Greenbank* (4) as correct in law. The like view was taken by R. S. Wright J., in *Smith* v. *Kaye* (5), where he said: "Would Mrs. Smith have left if the defendants had not interfered?" We contend in this case that it was for the jury to say whether Mrs. Place would have left the plaintiff's house if the defendant had not interfered. There was ample evidence upon which the jury could answer that question in the plaintiff's favour. McCardie J. was therefore wrong in not leaving the case to the jury. The view expressed by Darling J. in *Sanderson* v. *Hudson* (6), upon which McCardie J. relied—namely, that it must be shown that the wife's will was overborne by the stronger will of the defendant, finds no support in any of the earlier cases, and it is submitted that it is wrong. Very shortly after his decision in *Sanderson* v. *Hudson* (6) Darling J., in *Gray* v. *Gee* (7), stated the law in accordance with the older decisions; he said that the action (which was brought by a married woman against another woman for enticing away the plaintiff's husband) "would lie just as would the suit of a husband whose wife had been induced to leave him": see also per McCardie J. in *Butterworth* v. *Butterworth.* (8) The decisions in both *Sanderson* v. *Hudson* (6) and *Butterworth* v. *Butterworth* (8), it will be observed, were after the passing of the Sex Disqualification Removal Act, 1919, to which McCardie J. referred.

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(1) Willes, 577.

G. O. Slade for the respondent. McCardie J. was right in ruling that there was no evidence that the defendant

(1) [1898] A. C. 1, 27.

(2) Ibid. 92.

(3) Ibid. 122, 123.

(4) Willes, 577.

(5) 20 Times L. R. 261.

(6) Times Newspaper, January 29, 1923.

(7) (1923) 39 Times L. R. 429.

(8) [1920] P. 126, 130.

enticed the plaintiff's wife to leave him. The word "enticing" means something beyond giving advice; it involves active persuasion on the part of the defendant. Of that there was none present at the meeting of the parties on the night of July 11, 1931. The wife had stated, before the defendant came on the scene that evening, that she would not remain in the house, as she had been thoroughly unhappy with her husband. The words: "Come on, Gwen. We will go," read in their context, meant no more than this, that it would be dangerous for the wife to remain longer in her husband's house. In *Everett* v. *Griffiths* (1) Lord Finlay said that: "The question as to what constitutes evidence fit to be left to the jury is a question of law for the Court. For this purpose a mere scintilla of evidence is not enough. There must be evidence on which the jury might reasonably come to a conclusion in favour of the plaintiff." Here there was no such evidence.

SCRUTTON L.J. In this case the plaintiff brought an action alleging that the defendant had, without justification, persuaded his (the plaintiff's) wife to leave him. The action was tried with a jury, but the jury was unable to agree, and McCardie J. then considered whether there was any evidence on which a jury could find in favour of the plaintiff, and, coming to the conclusion that there was no such evidence, he gave judgment for the defendant. The question for this Court is whether there was any evidence on which a jury could reasonably find in favour of the plaintiff, although it might have found the other way.

It seems to be clear that at the present day a husband has a right to the consortium of his wife, and the wife to the consortium of her husband, and that each has a cause of action against a third party who, without justification, destroys that consortium. The old law has been altered to this extent, that the means of enforcing the right to consortium have been materially weakened. There are dicta in the old cases to the effect that a husband has the dominion and property over his wife; but since *Reg.* v. *Jackson* (1) it is clear that whatever rights the husband may possess he cannot enforce them by the physical confinement of his wife; he cannot seize her if she attempts to leave the consortium and lock her up. But there are still means of enforcing the right of the husband and the right of the wife. Formerly the Court made orders for the restitution of conjugal rights. Such decrees were obviously not enforceable by ordering specific performance, but they could be enforced by attachment. That power was taken away by s. 2 of the Matrimonial Causes Act, 1884. In *Reg.* v. *Jackson* (2) Fry L.J. said this: "That Act [i.e., the Act of 1884] deprived the Court of the power to enforce a decree for the restitution of conjugal rights by attachment, and substituted for that power two things: it gave power in the case of both husband and wife to order certain pecuniary allowances, and it further provided that non-compliance with the decree for restitution of conjugal rights should be deemed to amount to desertion without reasonable cause. These provisions are substituted for the old power to enforce the decree by attachment." The power to enforce by order money payments and the fact that it is a matrimonial offence to desert, however that term may be defined, rest upon existing rights of consortium, both in the husband and wife. There being such a right it follows, and it has been so decided in numerous cases, that any person who, without justification, interferes with that right is liable to an action in tort. Mr. Slade, who has argued this case with his usual ability and discretion, agrees that the statement in Lush's Husband and Wife, 3rd ed., p. 3, is correct—namely, that it "is the duty of the wife to reside and consort with her husband. This is a duty which she owes to him, and a person who tempts or entices her to violate this duty commits a wrong towards the husband for which he is entitled to recover damages; unless the person who harbours her acted from 'principles of humanity,' to protect her from her husband's ill-treatment, in which case no action can be maintained, even though it should turn out that the wife's

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(1) [1921] 1 A. C. 631, 668.

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(1) [1891] 1 Q. B. 671.

(2) [1891] 1 Q. B. 685.

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allegation was unfounded." The case of *Winsmore* v. *Greenbank* (1) is cited in support of that statement. That case is not old law, although it was decided a long time ago. In 1904 we find that in *Smith* v. *Kaye* (2) R. S. Wright J., who was probably one of the greatest masters of the law on the Bench, in considering a case where the brother and brother-in-law of a wife persuaded her to leave her husband, stated the law to the jury thus: "If the defendants persuaded her to leave, or induced her to leave, or incited her to leave, or procured her leaving, then they would be liable," and the jury returned a verdict for the plaintiff for 500*l*. McCardie J. stated the law in the same way in *Butterworth* v. *Butterworth*. (3) The decision of Darling J. in *Sanderson* v. *Hudson* (4), however, has been relied upon for the proposition that the defendant in such an action as this is not liable unless the wife's will has been overborne by the stronger will of the defendant. I know of no authority for that proposition, and in my view it is erroneous. It is quite sufficient to support the action if a wife of equal will with that of the defendant is persuaded to depart from the consortium of the husband. In following Darling J.'s ruling in *Sanderson* v. *Hudson* (4) McCardie J. was wrong.

That being so, the question on the facts is whether there was evidence on which the jury could reasonably come to the conclusion that the defendant's conduct offended against the rule of law I have stated. In considering this question, I agree that it is not enough to find one statement in the plaintiff's evidence which, if believed, would constitute a breach of his right; we have to look at the whole of the evidence, and unless we can say that the statement for the plaintiff cannot be accepted, because all the evidence is the other way, the case must be left to the jury. A case which well illustrates what the Court may do in such circumstances is *Slingsby* v. *Attorney-General*. (5) Mrs. Slingsby swore that she had given birth to a child on a certain date, and the judge believed her. The Court of Appeal reversed the learned judge's decision and entered judgment for the other party, because the evidence was such as to render it overwhelmingly impossible that Mrs. Slingsby could be telling the truth, and that view was upheld in the House of Lords. An enormously strong case is needed before the Court of Appeal can say that though there is evidence given by a witness it cannot reasonably be believed by the jury. Unless we get such a case as that, we must assume in considering the question whether there is any evidence on which the jury could reasonably find a verdict for the plaintiff, that they accepted the evidence in favour of the plaintiff and disbelieved the evidence given in favour of the defendant.

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(1) Willes, 577.

(2) 20 Times L. R. 261.

(3) [1920] P. 126.

(4) Times Newspaper, January 29, 1923.

(5) (1915) 31 Times L. R. 246; (1916) 32 Times L. R. 364; (1916) 33 Times L. R. 120.

What is the evidence in this case ? It is affirmed by the plaintiff and denied by the defendant that the plaintiff was entirely ignorant of the course of conduct which had been going on for some years between his wife and the defendant. It was said that the defendant and the plaintiff's wife, without the knowledge of the plaintiff, had been constantly meeting, and a great part of the evidence to that effect is by the wife herself. Once a week the defendant took his car out from Cambridge to a place some miles off, where he was met by the plaintiff's wife, and they then went to a place some twenty miles further off, where they had dinner. Being asked why this weekly dinner took place there, she replied that they could not get anything fit to eat at Cambridge. Not only was there this weekly dinner, twice a week they met, not at the defendant's house or at the wife's, but at a shooting-box some sixteen miles from Cambridge, and there they spent the afternoon. Further, the plaintiff's wife was taken out for riding. All this had been going on without the plaintiff being aware of it. Then came the day which has been so much talked of—July 11. There was in the plaintiff's house a lodger who said something suggesting to the plaintiff that the wife and the defendant had been committing adultery, and, as one might expect, the plaintiff did not receive this with perfect tranquillity; he went up to the room where the wife was in bed and an angry scene took place, the plaintiff threatening to stick a knife into her. Later that night the wife telephoned for protection—to whom? To the defendant. The two met outside the defendant's house and the defendant took her back to the plaintiff's house, and when they arrived there, according to Aurousseau's evidence, which the jury may believe, this happened: "I'm sorry," said he, "that I precipitated matters, but I have not done so with any malicious intention towards you." The defendant said: "It's all right. Don't worry. It had to come sooner or later. Perhaps you've done us a good turn." The wife talked with the defendant; the latter said to the witness: "I've known Mrs. Place for six years. Gwen is the only woman I have ever loved." Obviously the jury could draw one inference from that. A stormy scene and a fight then took place between the plaintiff and the defendant. The defendant said to the husband: "I shall do just as I am doing," and a little later he said, "Come on, Gwen. We will go," and they went. That is the evidence of Aurousseau, and if the jury accepted it, and the story of the secret interviews between the defendant and the plaintiff's wife during the previous five or six years, would it be unreasonable to say that the wife had left her husband because of the persuasion and inducement and incitement of the defendant? I can quite understand that the jury might come to another conclusion; they might say that everything up to that date was harmless, or that the plaintiff knew of it; that in what happened on the particular night, the defendant was merely protecting the wife against her husband's violence; and if the jury took the latter view that would have meant a verdict for the defendant. If, however, they took the other view as to the five or six years' association and that what happened in the end was merely the climax, they might reasonably find a verdict for the plaintiff.

I am not going through all the matters discussed by McCardie J., but, confining myself to the strict legal question before us and saying as little as possible about any further evidence because there will have to be a new trial, it appears to me that the judge was wrong in holding that there was no evidence on which a jury, properly directed, could reasonably find a verdict for the plaintiff. The case must go before another jury with a proper and careful direction from the judge limiting it to the particular question before him.

GREER L.J. I am of the same opinion. The question is whether the judge was right in saying that when all the evidence had been called there was no evidence for the jury to consider on the claim made by the plaintiff. I say that, because, although the judge was asked at the end of the plaintiff's case to rule that there was no evidence to go to the jury, and he might, if he had been so disposed, have ruled there and then to that effect, he declined to do so. The evidence of the defendant and the plaintiff's wife was then called, and we cannot exclude from our consideration that evidence. I agree that there is no room for dispute as to the law to be applied. It is accurately stated in the words quoted by Scrutton L.J. from Lush on Husband and Wife, although I should like to make one or two verbal alterations in the proposition there stated. At the foot of page 3 of that work it is said that: "Corresponding to the husband's dominion over the person of his wife is the duty of the wife to reside and consort with her husband. This is a duty which she owes to him, and a person who tempts or entices her to violate this duty commits a wrong towards the husband for which he is entitled to recover damages; unless the person who harboured her acted from 'principles of humanity.'" I think it would verbally be more accurate if, instead of using the words "tempts or entices her," it were said "procures, entices or persuades," and then, instead of the word "harboured," were substituted "procured, enticed or persuaded" her, the statement then continuing as in the text.

It is unnecessary to recapitulate the evidence of the plaintiff's wife and the defendant as to what had been going on for some years before the events of July 11. If Aurousseau's evidence is to be accepted, it is obvious that their association had had one result on the mind of the defendant—namely, that the plaintiff's wife was a woman whom he loved and the only woman whom he had ever loved, and also that their opportunities for meeting should be allowed to continue. It was in that state of mind that he was summoned by the wife to go to her house and deal with the situation that had arisen through the plaintiff having discovered what had been going on. When the defendant reached the house, according to Aurousseau's evidence, he said: "I have known Mrs. Place for six years: Gwen is the only woman I have loved," and then when the plaintiff came in and said to the defendant: "You have no right to do what you have been doing," the defendant insisted that he had the right. The husband asked what the defendant intended to do about it, to which the defendant answered: "I shall do just as I am doing," meaning thereby, "I am going to insist upon having the opportunities I have had in the past of associating with the woman" whom he stated he loved. The plaintiff told the defendant to go outside, and a fight ensued; the defendant, being the more powerful man, getting the better of it. According to the witness the defendant then said: "Come on, Gwen. We will go." The defendant apparently thought that it was no use for the wife to stay longer in the house, but the jury might think that what was in the defendant's mind was this, that he knew that unless Mrs. Place came away from her house the opportunities of friendship with her would come to an end. I think it is extremely probable that when the defendant came to the house he had no intention of taking Mrs. Place away; what he probably thought was that he was going into the presence of a complaisant husband, and finding that this was not so and having to fight it out with the husband, he said: "Come on, Gwen. We will go." That in my view was evidence upon which the jury could find that the defendant, having discovered that he could no longer have the opportunities of meeting the wife without the husband's assent, thought the only course was to go away from the house. It is quite true that having a wife of his own he did not take Mrs. Place to his own house; he took her not to the house of her mother, who was not then in good health, but to the house of a friend. It does not follow that, because next morning they may possibly have repented and desired to effect some kind of reconciliation, the defendant did not intend on the evening in question to persuade the wife that the parting of the ways had come and that they could not go on as before without leaving the house. We have to determine the question whether there was evidence of an inducement or enticement on July 11, and in doing that we cannot shut our eyes to what took place before that date. Looking at it in that light, I have come to the conclusion that there was evidence to go to the jury, and that the judge was wrong in ruling that there was not. That does not prejudge what may be the result of a trial before another jury. There is a good deal to be urged in favour of the view that Mrs. Place might have said that the time had come when she could no longer remain in her husband's house. That is one of the points of view which will have to be considered by the jury when the case is retried. But I am quite satisfied that McCardie J. was wrong in holding that there was no evidence on which a reasonable jury could come to the conclusion that Mrs. Place left in the end because she was persuaded to do so by the defendant.

SLESSER L.J. In this case the learned judge held that there was no evidence upon which the jury could find for the plaintiff on the cause of action alleged. In my view the judge, in coming to that conclusion, applied a test which he was not justified by the authorities in applying. The test he applied appears clearly in those words of his judgment: "There were no words of persuasion, no words of enticement, not even words of advice—merely the words: 'Come on, Gwen. We will go.' In what way can it properly be said that the wish and will of the wife was overborne?" In an earlier passage he said this: "It seems to me, if I may respectfully say so, that the first real recognition of the changed status of married women was made by Darling J., as he then was, in *Sanderson* v. *Hudson*. (1) He there pointed out that the old authorities as to mere harbouring could not apply in view of the altered position of wives. He further said that,

(1) Times Newspaper, January 29, 1923.

in order to succeed in an action for enticement, a plaintiff must prove that the wife had been induced to do that which she would not have done voluntarily; that she had, in a real and effective manner, been induced and persuaded to leave her husband, and that (in substance) her will had been overborne by the stronger will of the defendant." As I read his judgment, the judge has asked himself, was there any evidence that the will of the wife had been overborne by the defendant; and he had this amount of justification for asking the question that it appears to be the fact that Darling J. in the case referred to said that, in order to succeed in such an action, it must be proved that the wife's will had been overborne. In my view that is an erroneous test to apply. If the matter is considered as one of principle, this kind of action is founded upon a violation of a legal right, and so we have to inquire whether the defendant has done something which amounts to such a violation. The matter is put very clearly in *Allen* v. *Flood* (1) by Lord Watson in these words (2): "He who wilfully induces another to do an unlawful act which, but for his persuasion, would or might never have been committed, is rightly held to be responsible for the wrong which he procured." That, it appears to me, is the proper test to apply in asking the question in this case: did the defendant induce Mrs. Place to do an unlawful act which, but for his persuasion, she would or might not have committed? That is a much lower standard as to what is necessary to constitute a violation of a legal right than that suggested by Darling J. in *Sanderson* v. *Hudson* (3)—that the wife's will must be overborne. That view I can only call a heresy. No such view had ever previously been suggested; no support is to be found for it in the decision of R. S. Wright J. in *Smith* v. *Kaye* (4), or in any of the earlier authorities.

McCardie J. says further in his judgment that the law on this subject has been greatly modified in recent years. As to that, it is true that under the Matrimonial Causes Act, 1884, and in accordance with the decision in *Reg.* v.

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(1) [1898] A. C. 1.
(2) Ibid. 107.
(3) Times Newspaper, January 29, 1923.
(4) 20 Times L. R. 261.

Jackson (1), it is not now possible to attach a person who disobeys a decree for restitution of conjugal rights, nor is it permissible for a man to detain his wife by force. But these modifications have left the law unimpaired as to the husband's right to the consortium of his wife. In *Reg.* v. *Morris* (2) Byles J. said that "it is a sound rule to construe a statute in conformity with the common law, rather than against it, except where or so far as the statute is plainly intended to alter the course of the common law." If there were any doubt on the matter now in question the decision in *Smith* v. *Kaye* (3), which was long after the passing of the Matrimonial Causes Act, 1884, and after the decision in *Reg.* v. *Jackson* (1), and, curiously enough, the decision of Darling J. in *Gray* v. *Gee* (4), (where he held, only three months after his decision in *Sanderson* v. *Hudson* (5), that an action will lie by a married woman against another woman for enticing away the plaintiff's husband), show that the law as to the right to consortium entitling the injured spouse to bring an action against a third party who has procured a violation of that right has not been altered. As I have said, in considering whether there has been a violation of that right, the test must be whether something has been done which, but for the interference of the defendant, would not have been done. The question whether what was done amounted to advice or persuasion may be one of degree, and it is for the jury to consider. In this case the judgment of McCardie J. is so infected with his view as to the necessity for the overbearing of the will, that the wrong test has been applied. There was, in my opinion, evidence which ought to be left to the jury. I agree that there should be a new trial.

Appeal allowed; new trial ordered.

Solicitor for appellant: *Edmond O'Connor & Co., for Sidney J. Peters, Cambridge.*

Solicitors for respondent: *Waterhouse & Co., for Few & Wild, Cambridge.*

(1) [1891] 1 Q. B. 671.
(2) (1867) L. R. 1 C. C. R. 90, 95.
(3) 20 Times L. R. 261.
(4) (1923) 39 Times L. R. 429.
(5) Times Newspaper, January 29, 1923.

J. S. H.

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TEMPERANCE LOAN FUND, LIMITED *v.* ROSE AND ANOTHER.

[1930. T. 1657.]

Money-lender—Loan Transaction—Renewal of Loan—Joint Promissory Note by Borrower and Surety—Memorandum in Writing—Omission of Date when Loan made—Liability of Surety—Moneylenders Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 21), *s.* 6.

Every contract between a money-lender and a borrower for the repayment by the latter of money lent to him—and that includes a promise by the borrower to pay the balance of money previously lent to him—is brought within the purview of s. 6 of the Moneylenders Act, 1927. Where a transaction is the renewal of an old loan, the fact that it is such ought to be set out in the memorandum in order to comply with s. 6.

If the transaction between a money-lender and a borrower is unenforceable against the borrower by reason of non-compliance by the money-lender with the requirements of s. 6—for example, by the omission from the memorandum of the date on which the loan was made—it is equally unenforceable against a person who has guaranteed the payment of the debt.

Eldridge & Morris v. *Taylor* [1931] 2 K. B. 416 followed. *Yorkshire Railway Wagon Co.* v. *Maclure* (1881) 19 Ch. D. 478; *Wauthier* v. *Wilson* (1911) 27 Times L. R. 582 held inapplicable.

Per Scrutton L.J.: *Gaskell* v. *Askwith* (1929) 45 Times L. R. 439, 566 did not decide that a mere clerical error in the memorandum required by s. 6 of the Moneylenders Act, 1927, will invalidate the memorandum; and it must not be taken that a mere clerical error will have that effect.

Per Slesser L.J.: The Moneylenders Acts are not to be construed strictly in favour of lenders; they are to be construed on the same canons as any other Act.

A security "given by the borrower" within s. 6 of the Act of 1927 may take the form of a guarantee given by a third party.

Decision of Hawke J. reversed.

APPEAL from a decision of Hawke J.

The plaintiffs sued the defendants Rose and Comins for the balance of 232*l.* due on a joint and several promissory note dated July 30, 1929, in these terms: "We jointly and severally promise to pay the Temperance Loan Fund, Limited, or order the sum of 248*l.* for value received payable at 12A Station Parade, Balham High Road, S.W. 12, by five consecutive monthly payments of 8*l.* each, the first instalment to be due and payable on August 30, 1929, and the sum of 208*l.* on January 30, 1930. The interest is to be at the rate of 48 per cent. per annum."

The promissory note was given in the following circumstances: The plaintiffs, who were registered money-lenders, lent the defendant Rose the sum of 200*l.* by cheque dated January 30, 1929, which was to be repaid on July 30, 1929. The loan was not then repaid, but the plaintiffs agreed to continue it on the terms stated in the following memorandum:

"Moneylenders Act, 1927.

"Memorandum of the contract between The Temperance Loan Fund, Limited (hereinafter called the lenders) whose registered office is at 12A Station Parade, Balham, in the county of Surrey, and Philip William Rose . . . . (hereinafter called the borrower) in respect of a loan to the borrower of the undermentioned sum upon the following terms:

"The borrower is indebted to the Temperance Loan Fund, Limited, in the sum of 200*l.* The borrower is to pay interest on the said sum at the rate of 48 per cent. per annum.

"Repayment of the said sum ~~of principal and~~ interest is to be by 5 consecutive monthly payments of 8*l.* each, the first of such payments to be made on the 30th day of August 1929, and the sum of 208*l.* on the 30th day of January 1930. The borrower shall secure that Mr. Thomas R. Comins . . . . shall guarantee the repayment of principal and interest.

"As witness the hands of the parties this 30th day of July 1929."

[This was signed on behalf of the lenders and by the borrower.]

"To be filled up and signed when loan is completed.

"I, the above named borrower hereby acknowledge (*a*) that the above mentioned sum of 200*l.* is owing by the borrower to the said The Temperance Loan Fund, Limited, ~~and lent to me on the undermentioned date~~; (*b*) that I have on the undermentioned date subsequent to the said loan being made received a copy of the above contract; (*c*) that the above mentioned contract was personally signed by me before the said money was lent or paid and before the security was given.

"Dated this 30th day of July 1929."

[This was signed by the borrower.]

The promissory note not having been paid on January 30, 1930, the plaintiffs sued the two defendants thereon. The defendant Rose did not defend the action and the plaintiffs signed judgment against him, but the defendant Comins contested the claim on the ground, as he alleged, that the provisions of the Moneylenders Act, 1927 (1), had not been complied with in that (*a*) a copy of the promissory note had not been sent to him within seven days of the date thereof; (*b*) that no note or memorandum of the contract was made or signed by him nor was any copy thereof delivered or sent to him as required by the Act; (*c*) that the memorandum of the contract signed by the defendant Rose was not a note or memorandum which satisfied the requirements of s. 6, sub-s. 1, of the Act of 1927.

Hawke J. gave judgment for the plaintiffs.

The defendant Comins appealed.

Wallington for the appellant. The note or memorandum fails in several material respects to comply with the requirements of s. 6 of the Act of 1927. First, the appellant was a "borrower" within the meaning of the section and therefore he should have had, and did not have, a copy of the memorandum sent to him. Secondly, no reference is made in the memorandum to the fact that a promissory note was given as security; that should have been stated, seeing that the memorandum "shall contain all the terms of the contract." Thirdly, the date on which the loan was made is not shown in the memorandum, as required by s. 6, sub-s. 2. The contract being clearly on these two latter grounds unenforceable against Rose is also unenforceable against the appellant the surety: *Eldridge & Morris* v. *Taylor.* (1)

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(1) Moneylenders Act, 1927, s. 6: "(1.) No contract for the repayment by a borrower of money lent to him . . . . by a moneylender after the commencement of this Act or for the payment by him of interest on money so lent and no security given by the borrower . . . . in respect of any such contract shall be enforceable, unless a note or memorandum in writing of the contract be made and signed personally by the borrower, and unless a copy thereof be delivered or sent to the borrower within seven days of the making of the contract; and no such contract or security shall be enforceable if it is proved that the note or memorandum aforesaid was not signed by the borrower before the money was lent or before the security was given as the case may be.

"(2.) The note or memorandum aforesaid shall contain all the terms of the contract, and in particular shall show the date on which the loan is made, the amount of the principal of the loan, and, either the interest charged on the loan expressed in terms of a rate per cent. per annum, or the rate per cent. per annum represented by the interest charged as calculated in accordance with the provisions of the First Schedule to this Act."

[He also referred to *Lyle* v. *Chappell.* (2)]

Croom-Johnson K.C. and *C. Bray* for the respondents. On the facts no memorandum was required at all. Sect. 6 of the Act deals with a contract for the repayment by a borrower of money lent, and is not dealing with a contract which provides for security being given in respect of money lent at an anterior date and in respect of which a debt had arisen. The objections taken to the memorandum as not satisfying s. 6 have therefore no application. The further argument advanced, that if the contract is not enforceable against Rose it is unenforceable against the appellant is also not maintainable. The mere fact that a debt may be unenforceable against a principal does not necessarily involve that the surety cannot be proceeded against. In *Yorkshire Railway Wagon Co.* v. *Maclure* (3) it was held that the directors of a railway company who had guaranteed certain payments on behalf of the company were liable, although the transaction as regards the railway company was illegal and void. The principle of that case was applied in *Garrard* v. *James.* (4) Similarly, in *Wauthier* v. *Wilson* (5), where a father joined in a promissory note as guarantor in respect of a loan to his son, who was under age when the money was advanced to him, it was held that although by the Infants Relief Act, 1874, the transaction was void as against the son, the guarantee was valid and the father was liable. Those authorities were not cited to the Court in *Eldridge & Morris* v. *Taylor.* (1)

No reply was called for.

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(1) [1931] 2 K. B. 416.
(2) [1932] 1 K. B. 691.
(3) (1881) 19 Ch. D. 478.
(4) [1925] Ch. 616.
(5) 27 Times L. R. 582.

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SCRUTTON L.J. The Moneylenders Act, 1927, upon which the question in this case arises, was intended to restrict the way in which money-lenders carry on their business, and one of the ways in which it does this is by providing that before they lend money to a borrower they shall give him a memorandum of the terms upon which the money is lent. Sect. 6 enforces this by saying that "no contract for the repayment by a borrower of money lent to him . . . . by a moneylender . . . . and no security given by the borrower . . . . in respect of any such contract shall be enforceable, unless a note or memorandum in writing of the contract be made and signed personally by the borrower, and unless a copy thereof be delivered or sent to the borrower within seven days of the making of the contract; and no such contract or security shall be enforceable if it is proved that the note or memorandum aforesaid was not signed by the borrower before the money was lent or before the security was given as the case may be." Several cases have come before us in which the question has been whether the memorandum signed by the borrower was such as to comply with the terms of the Act; and in some of these cases the point has arisen whether clerical mistakes in the memorandum make it insufficient. The headnote to *Gaskell* v. *Askwith* (1), which says that if the memorandum "states the date of the loan incorrectly, the contract is unenforceable, even although the inaccuracy has caused no deception and is due merely to a clerical error," does not in my opinion correctly state the effect of the decision in that case. I find nothing in the judgment of Humphreys J. which supports the latter part of the headnote, nor is there anything in the judgment of this Court as reported about a clerical error. The Court of Appeal has apparently no power to amend the memorandum, but I do not wish it to be taken that a clerical error will necessarily invalidate it; in each case it must depend upon the nature of the error. *Gaskell* v. *Askwith* (1) was not a case of a clerical error. There the money-lender found it difficult to fit the memorandum into the facts which

(1) 45 Times L. R. 439, 566.

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happened, for he expected the transaction to be carried out on August 9, and drew up the memorandum on that footing, expecting to get the signature on that day. As it happened the borrower was away on that date, and his signature was not obtained till August 17. The money-lender was in this difficulty on the question, when was the loan made? If the loan was made on August 9 there was no memorandum in writing before it was made; if the loan was made on August 17, the date of the memorandum was wrong. There was no clerical error. On either of the two hypotheses there was a real error in drawing up the memorandum. *Gaskell* v. *Askwith* (1) must therefore not be taken as deciding anything about clerical errors. In *Reading Trust, Ld.* v. *Spero* (2) I said that the particular difference there relied on was too trivial for notice. Of course that again must in each case turn upon what the particular variation is.

In this case the plaintiffs lent Rose 200*l.* by cheque on January 30, 1929, the amount to be repaid on July 30, 1929. The loan was not repaid on that date, but apparently the plaintiffs were ready to continue it on terms which they stated in a memorandum—namely, that five consecutive monthly payments were to be made of 8*l.* each, and the sum of 208*l.* was to be paid on January 30, 1930. They might have done this in the way that was adopted in *Lyle* v. *Chappell* (3)—namely, by lending the borrower money to repay his debt and making that new loan commence on July 30. In *Lyle's* case (4) I said this: "When the time for payment of the original loan has expired without complete repayment, and the time for repayment is extended or altered, there is a fresh loan, and it is sufficient if the memorandum of the altered terms precedes the commencement of the extended period. The draftsmanship of s. 6 might be better, but I cannot think that Parliament intended to render renewals impossible. As to the second point, I see no objection to the procedure of wiping off the old loan by treating it as a new loan on the altered terms, when the fact

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(1) 45 Times L. R. 439, 566.
(2) [1930] 1 K. B. 492.
(3) [1932] 1 K. B. 691.
(4) Ibid. 700.

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that this is being done is shown on the face of the second memorandum." In this case the facts show that I was probably right in saying that it ought to be shown on the face of the second memorandum what was being done. The money-lenders in this case had a form which was obviously intended for a transaction where some money was still owing when the fresh loan was to be made and where the total amount of the second loan was to be repaid by a series of instalments which in the end would repay the principal and interest on the two loans. Some one in the money-lenders' office took that form; he had a statement in it as printed: "I, the above named borrower hereby acknowledge (*a*) that the above mentioned sum of 200*l.* is owing by the borrower to the said The Temperance Loan Fund, Limited, and lent to me on the undermentioned date." Those last words he struck out. If he had left them in the document would have shown the date, July 30, 1929. The clerk also altered other parts of the form. He left in a recital that "the borrower is indebted to [the lenders] in the sum of 200*l.* The borrower is to pay interest on the said sum at the rate of 48 per cent. per annum. Repayment of the said sum interest"—he struck out the words "of principal and"—"is to be by five consecutive monthly payments of 8*l.* each . . . . and the sum of 208*l.* on the 30th day of January 1930." As it stands this appears to suggest that the 248*l.* is interest, which, of course, it is not.

The money not being repaid, the plaintiffs, who had the memorandum signed by Rose, and having received a promissory note signed by him and the appellant, and given a copy of the memorandum to Rose, sued him and the appellant. Rose did not appear, and judgment was signed against him. The appellant appeared and took various points, one being that the action being on a promissory note given as security for money lent is unenforceable, because no note or memorandum in writing complying with the Moneylenders Act, 1927, has been signed. The Act requires, among other things, that the note or memorandum must show the date on which the loan was made. On the facts

I have stated the note or memorandum should show either the date when the original cheque was given—namely, January 30, 1929, or if the loan is to be treated as made not on that date but on July 30 by the transaction of paying off the old loan and starting a new loan it should show that date. It states neither date. It merely says that the borrower acknowledges "that the above mentioned sum of 200*l.* is owing by the borrower," and the reference to the date of the loan is struck out. There is therefore no compliance with the requirement of the Act that the date of the loan must be stated. The memorandum does not, as was suggested in *Lyle* v. *Chappell* (1) might be done, set out the real facts—namely, that there was a loan of 200*l.* on January 30, 1929, which was to be repaid by a series of instalments by July 30, and a new loan made on different terms as to repayment, which new loan was made on July 30. The memorandum merely says that the borrower is indebted in the sum of 248*l.* That is not a compliance with the statute. Consequently this point succeeds, subject to the contention on behalf of the money-lenders that even if, as against Rose, the memorandum is bad, it is good as against the surety, because several cases connected especially with companies have decided that there may be a surety guaranteeing the debt of a company which the company is not liable to pay. A sum may be borrowed by a company, and the lender says: "I must have some one to guarantee the debt," and thereupon the guarantor guarantees that the company will pay. It has been held that in such a case, if the borrowing was ultra vires the company, the principal is not liable, but that the surety is liable. The same point has been decided in the case of a father guaranteeing the debt of his infant son, where it has been sought to make the father liable. Those cases, however, do not affect the question under s. 6 of the Moneylenders Act, 1927. I am relieved from considering these authorities, because this action is upon a promissory note; that note is a security given by a borrower to money-lenders; that security includes a promise by a

(1) [1932] 1 K. B. 691.

third party that he will pay, and the Act says that that security shall be unenforceable unless a memorandum complying with the statute has been signed. That is a sufficient answer to the point made by the money-lenders. Consequently the appellant is discharged, and the appeal must be allowed. The Act will doubtless continue to raise difficult questions owing to the fact that the draftsman or the members of Parliament did not quite clearly understand what they were doing in connection with such contracts.

GREER L.J. I agree. It was contended on behalf of the appellant that the plaintiffs ought not to have succeeded in the action, because the promissory note on which it was brought was a security for the repayment of money lent, and was rendered unenforceable by reason of s. 6 of the Moneylenders Act, 1927. It was argued that in several particulars the memorandum of the contract was insufficient, and that I think is the only one of the objections which survives for consideration. Mr. Croom-Johnson on behalf of the plaintiffs put forward two additional contentions to those which were argued before Hawke J. He says that s. 6 has no application to a case which is concerned with the payment of an admitted debt, even though that admitted debt happens to be the balance of a sum due for money lent. If that is right the plaintiffs are not affected by the Act and entitled to succeed. Mr. Croom-Johnson contended further that although the section made the note unenforceable as against Rose it did not make it unenforceable against Comins, the guarantor. I think both of these contentions fail by reason of the express words of s. 6 and also by reason of the decisions which have been given in this Court in cases where not only the borrower was concerned but the person signing as surety. Even if there had been no authority on the subject I should have come to the same conclusion, because the language of the section is express that every contract which can be described as a contract for the repayment of money lent, and that includes a promise to pay the balance of money previously lent, is brought within the purview of the section. If the second contention urged by Mr. Croom-Johnson—namely, that the Act makes the contract unenforceable only as against the borrower, were sound, the effect would be that the statute would give a defence to the borrower who has no merits and who has had the money, but refuses a similar defence to a person who signs merely as guarantor and who has not had the money. I decline to construe the section in that way. The section is not confined in its operation to a contract for the repayment of money lent. It says that any security given shall be unenforceable unless certain conditions are complied with. Sect. 6 clearly applies to a promissory note, bill of exchange, or any other security given by a third party and received by the money-lenders as security for the payment of the money lent. Even if I had any doubt about the meaning of s. 6, I should hold myself bound by the decisions of this Court in *Eldridge & Morris* v. *Taylor* (1); *Gaskell* v. *Askwith* (2); and *Lyle* v. *Chappell* (3), which are quite inconsistent with Mr. Croom-Johnson's contention, which I suppose was introduced with the object of keeping it open if the question comes before a higher Court.

The other objection to the claim is not so easy, because of the difficulty in applying s. 6 to the renewal of a loan. In *Lyle* v. *Chappell* (3) there was an agreement whereby there was to be a new loan of a sum which was to be used in part for the payment off of the balance of the old loan. Part of the money lent was to be returned to extinguish the balance of the old loan. Not only was there an agreement to this effect, the agreement was carried out by a cheque being handed over by the money-lenders to the borrower after a memorandum of the contract was signed, and the borrower indorsing it and handing it back to them. In my judgment I said this (4): "If the money to be borrowed was intended to be used for the extinction of the debt agreed by the parties at 200*l.*, it seems to me unnecessary that the parties should go through the idle form of passing the cheque

(1) [1931] 2 K. B. 416.
(2) 45 Times L. R. 439, 566.
(3) [1932] 1 K. B. 691.
(4) Ibid. 704.

backwards and forwards. If the contract had provided for the borrowed money to be paid over to the defendant and then repaid to the plaintiffs, it would, according to the authorities, have been unnecessary to go through the form of handing over the money." In this case there was no evidence except the signature of the memorandum form, and we do not know whether it is an agreement in respect of the money which had been borrowed previously or whether it is an agreement for the repayment of money which was notionally deemed to be lent at the time of the signature; but if there was no loan until the agreement was signed, it is impossible to say that the contract was personally signed before the money was lent, and the statute requires that this shall be done. In my judgment the only way in which this statute can be complied with in dealing with the renewal of the balance of an old loan is for the old loan to be treated as paid off and a new loan granted. The memorandum must be signed before the notional loan of that kind is made, otherwise s. 6 is not complied with.

In my opinion this memorandum does not contain one of the essential elements—namely, the date when the loan was made. For these reasons I think the appeal should be allowed.

SLESSER L.J. I agree. It has been argued, among other things, on behalf of the respondents that the Moneylenders Acts, 1900 and 1927, are an invasion of the common law, or, as Mr. Bray put it, that they are penal statutes and as such should be construed more strictly in favour of the lender than would otherwise be the case. That argument, in my opinion, is ill-founded. It is based upon the assumption that at common law the right to make agreements for the lending of money at interest was unrestricted, whereas the contrary is the fact. At common law such a contract constituted one of the forms of what was called "usury." I may mention two authorities which lay it down quite clearly that usury at common law was unlawful. In Coke's Institutes, vol. iii., p. 151, we find this statement: "And it is also enacted by Parliament, that all usury is unlawful, that is to say, against the laws of the realm"; and in Comyns' Digest, title "Usury," it is said that "usury was an offence by the common law." It is therefore clear that transactions such as are dealt with by the Moneylenders Act, 1927, were forbidden by the common law. A series of statutes from the time of Henry VIII. to 17 & 18 Vict. c. 90 permitted the lending of money at varying rates of interest. These restrictions on the right to lend money at interest were abolished by 17 & 18 Vict. c. 90, and it is true to say that between the passing of that Act and the passing of the Moneylenders Act, 1900, a money-lender was free to lend money on such terms as he thought fit, subject to the equitable jurisdiction of the Court of Chancery to interfere in particular cases. But to say that the Legislature did not think fit to impose statutory restrictions on money-lenders between 1854 and 1900 is a very different thing from saying that the restrictions now imposed are an invasion of the common law. The language of s. 6 of the Act of 1927 is to be construed like any section in any other Act.

The only other matter on which I desire to comment is as to the liability of the surety. Mr. Croom-Johnson has argued that even if the borrower is not liable the surety is liable, his argument being that s. 6, sub-s. 1, which says that "no security given by the borrower . . . . shall be enforceable," applies only when the security is given by the borrower himself. He contends that in this case the security was not given by the borrower but was given by the surety, and therefore this security does not fall within the language of the section. The first observation upon that is that in fact in this case two persons, the borrower and Comins, became jointly and severally liable on a promissory note so that the security was given by the borrower jointly and severally with the surety, thus bringing the security within the very terms of the section. Moreover a security "given by the borrower" may take the form of a guarantee given by a third party; it is a security given to the money-lender in order that he may lend money to the borrower.

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This point was not directly taken in *Eldridge & Morris* v. *Taylor* (1), but be that as it may, I have come to the conclusion that on the proper interpretation of s. 6 it is not necessary to consider the cases which decided that where a company acts ultra vires in incurring a debt the surety who guaranteed the debt may be liable although the company may not be liable. Here it is sufficient to say that s. 6 specifically provides that "no security given by the borrower . . . . shall be enforceable" unless certain conditions are fulfilled, and a security is given by the borrower when he produces the guarantee of a surety.

Appeal allowed.

Solicitors for appellant: *Parfitt, Cresswell & Williams.*
Solicitors for respondents: *Webster Butcher & Sons.*

(1) [1931] 2 K. B. 416.

J. S. H.

THE KING *v.* JUDGE CLEMENTS.

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April 25, 26.

Tithe Rentcharge—Recovery—Order for Distress—Sale by Auction—Combination to prevent Sale being successful—Application by Tithe Owner for Second Order for Distress—Order by County Court Judge for Second Distress—Sale by Tender—Certiorari—Jurisdiction of County Court Judge to make Second Order—Tithe Act, 1836 (6 *&* 7 *Will.* 4, *c.* 71), *s.* 81—*Tithe Act*, 1891 (54 *Vict. c.* 8), *ss.* 2, 10.

Upon the application of the tithe owners a county court judge made an order for the recovery of tithe rentcharge issuing out of certain lands, and he directed that an officer of the court should distrain upon those lands for the sum. The officer of the court distrained and offered the goods seized for sale by auction. A number of persons attended the sale and by their conduct prevented it from being successful, not bidding themselves and preventing others from bidding. The tithe owners thereupon applied to the county court for a further order for the recovery of the same tithe rentcharge, together with the costs and expenses of the abortive sale. The county court judge accordingly made an order that a second distress be levied for the recovery of the same tithe rentcharge, together with the costs, and directed that the goods seized should be sold by tender. A rule nisi for certiorari was obtained to remove the second order of the county court judge into the High Court upon the ground that he had no jurisdiction to entertain or adjudicate upon the application or to make the order:—

Held, that the county court judge had not exceeded his jurisdiction in ordering a second distress, in view of the fact that there was a combination of persons to prevent the sale on the first distress from being effective, or in ordering that the goods seized should be sold by tender. Further, that the application for the second distress was properly made by the tithe owners, and that it was not necessary that it should be made by the officer of the court.

Rule Nisi calling upon His Honour Judge Clements, judge of the county court of Kent holden at Ashford, to show cause why a writ of certiorari should not issue to remove into the High Court a certain order made by him and dated November 9, 1931, between Queen Anne's Bounty, applicants, and Henry Arthur Ferridge, owner, respondent.

Upon March 28, 1931, the agents for Queen Anne's Bounty gave notice to the Ashford County Court, for service on H. A. Ferridge, that they would apply for an order for the recovery of the sum of 2*l.* 16*s.* 3*d.* due in respect of the tithe rentcharge issuing out of the lands described in the schedule to the notice for the period of one half-year, which became payable on October 1, 1930. The notice further stated that the owner of the said lands was Mr. H. A. Ferridge, and that he was the sole occupier of the lands. The notice also stated that they would apply that the order for recovery be executed by the appointment of an officer to distrain under sub-s. 2 of s. 2 of the Tithe Act, 1891 (1).

Upon May 4, 1931, an order was made by the county court judge, upon the application of Queen Anne's Bounty, against H. A. Ferridge, the owner and occupier of the lands, that the sum of 2*l.* 16*s.* 3*d.* be recovered, together with costs, in respect of tithe rentcharge issuing out of the lands described in the schedule to the order due for the period of one half-year, and that for the purpose of such recovery Mr. A. H. Joy, an officer appointed by the Court, should distrain upon those lands and also on the lands which were liable to be distrained on under s. 85 of the Tithe Act, 1836 (2), for the said sum

(1) Tithe Act, 1891, s. 2, sub-s. 1: "Where any sum due on account of tithe rentcharge issuing out of any lands is in arrear for not less than three months, the person entitled to such sum may, whatever is the amount, apply to the county court of the district in which the lands or any part thereof are situate, and the county court, after such service on the owner of the lands as may be prescribed, and after hearing such owner if he appears and desires to be heard, may order that the said sum, or such part thereof as appears to the court to be due, be, together with the costs, recovered in manner provided by this Act, and tithe rentcharge as defined by this Act shall not be recovered in any other manner."

Sub-s. 2: "Where it is shown to the court that the lands are occupied by the owner thereof, the order shall be executed by the appointment by the court of an officer who, subject to the direction of the court, shall have the like powers of distraint for the recovery of the sum ordered to be paid as are conferred by the Tithe Acts on the owner of a tithe rentcharge for the recovery of arrears of tithe rentcharge, and no greater or other powers; and if there is no sufficient distress the person entitled to the sum ordered to be recovered may proceed to obtain possession of the lands under s. 82 of the Tithe Act, 1836."

Sect. 10, sub-s. 2: "A sum on account of tithe rentcharge shall not be recoverable under this Act unless proceedings for such recovery have been commenced before the expiration of two years from the date at which it became payable."

(2) Tithe Act, 1836, s. 81: ". . . . In case the said rentcharge shall at any time be in arrear and unpaid for the space of twenty-one days next after any half-yearly day of payment, it shall be lawful for the person entitled to the same, after having given or left ten days notice in writing at the usual or last known residence of the tenant in possession,

together with 2*s.* 6*d.* for costs, and also the costs of the distress, and that for the making of such distress that order should be the officer's warrant.

It appeared from the affidavits and from the evidence subsequently given in the county court by Arthur H. Joy, the officer appointed by the court to distrain, that the officer distrained upon certain goods and chattels belonging to the applicant Ferridge of more than sufficient value to satisfy the amount of the tithe rentcharge and the costs of the order. He retained possession of the goods and chattels for the requisite period and offered them for sale by auction. At the same time the officer offered for sale distresses seized by him under the powers given to him by four similar orders made by the county court judge on May 4, 1931. The officer did not make any application to the court for any order or direction.

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to distrain upon the lands liable to the payment thereof, or on any part thereof, for all arrears of the said rentcharge, and to dispose of the distress when taken, and otherwise to act and demean himself in relation thereto as any landlord may for arrears of rent reserved on a common lease for years; provided that not more than two years arrears shall at any time be recoverable by distress."

Sect. 82: ". . . . In case the said rentcharge shall be in arrear and unpaid for the space of forty days next after any half-yearly day of payment, and there shall be no sufficient distress on the premises liable to the payment thereof, it shall be lawful for any judge of His Majesty's courts of record at Westminster, upon affidavit of the facts, to order a writ to be issued, directed to the sheriff of the county in which the lands chargeable with the rentcharge are situated, requiring the said sheriff to summon a jury to assess the arrears of rentcharge remaining unpaid, and to return the inquisition thereupon taken to some one of His Majesty's courts of law at Westminster, on a day therein to be named, either in term time or vacation . . . . and thereupon the owner of the rentcharge may sue out a writ of habere facias possessionem, directed to the sheriff, commanding him to cause the owner of the rentcharge to have possession of the lands chargeable therewith until the arrears of rentcharge found to be due, and the said costs, and also the costs of such writ and of executing the same, and of cultivating and keeping possession of the lands, shall be fully satisfied: Provided always, that not more than two years arrears over and above the time of such possession shall be at any time recoverable."

By s. 85 the powers of distress and entry were to extend to all lands within the parish occupied by the owner or under the same landlord or holding.

The officer stated in evidence that on September 15, 1931, he had attempted to sell by auction goods seized in distress in respect of four orders for the recovery of tithe, and had also on the following day attempted to sell goods similarly seized under another order. All the sales were held in the same district. At the first attempted sale, held on the premises of J. Hooker, the goods offered for sale consisted of a stack of hay valued at 40*l.* There were about 100 to 150 persons present. A man who bid 5*l.* was hustled and driven from the premises by the crowd and the tyres of his car were deflated. He did not return. A Mr. Kedward was then understood to bid 500*l.* This bid was subsequently disputed and withdrawn. On the goods being put up again a bid of 10*s.* from a Mr. Haffenden was the highest forthcoming. At the second sale on the same day, on the premises of L. Crump, a stack valued at about 80*l.* was offered for sale. Substantially the same persons attended. The highest bid forthcoming was one of 10*s.* from Mr. Haffenden. Later on the same day, on the premises of A. E. Doust, a stack of hay valued at 50*l.* was offered for sale. Again substantially the same persons attended. The highest bid forthcoming was one for 3*s.* 6*d.* from Mr. Haffenden. Later on the same day, on the premises of the applicant Ferridge, a stack of hay valued at between 30*l.* and 40*l.* was offered for sale. Again substantially the same persons attended. The only bid offered was for 3*s.* 6*d.* from Mr. Haffenden. On the next day, on the premises of E. H. Richards, a stack of hay valued at between 40*l.* and 50*l.* was offered for sale. Substantially the same persons attended. One, Wollatt, who inquired if a bid of 5*l.* would be in order and was informed that it would, was surrounded in a hostile manner and did not bid. The highest bid was 5*s.* from Mr. Kedward.

Mr. H. A. Ferridge, in his affidavit, said that "feeling in the neighbourhood is strong against the imposition and collection of tithe rentcharges, and on the said application [by Queen Anne's Bounty for the second order of distress] it was alleged that by reason of steps taken at the time of the said auction sale or sales by the respondents in the said proceedings and/or their friends in the neighbourhood each of the said sales was abortive; to some extent this was true, but I cannot say to what extent."

The agents for Queen Anne's Bounty were informed by the registrar of the Ashford County Court that in the case of Ferridge the amount required to be recovered for tithe rentcharge was 2*l.* 18*s.* 9*d.*, the fees and expenses incurred in respect of the distress and sale were 2*l.* 0*s.* 4*d.*, and the amount realized by the sale was 3*s.* 6*d.*, and asking to be paid 1*l.* 16*s.* 10*d.*, the amount of fees not recovered.

Upon October 16, 1931, the agents for Queen Anne's Bounty gave notice of their intention to apply to the Ashford County Court on November 9, 1931, for a further order appointing an officer of the court to make a distress to recover the sum of 2*l.* 18*s.* 9*d.* ordered to be recovered by an order of the court made on May 4, 1931, together with the costs and expenses incidental to the sale carried out by the court under the last mentioned order on September 15, 1931, together with the costs of the application.

The county court judge, in giving judgment on November 9, 1931, said that he had come to the conclusion that the large body of persons who attended the sales had gathered together with the set purpose of turning these sales into a farce and rendering them abortive. Their presence there was not for the purpose of bidding, but for preventing persons from bidding. And they were successful in their enterprise. All were there to stop the sales, and they did it. That was his conclusion from the evidence. The farmers having by their conduct prevented the law taking its course, it was his duty to see to it that they did not ultimately succeed. The only way he could deal with it now was that he must order a sale to take place. The previous sales were a mere farce and abortive, and in order that a proper sale should take place, and seeing the conduct of the company who met at the other sales, he must order that the sale be by tender.

Accordingly, on November 9, 1931, an order was made by the county court judge that a second distress be levied for the sum of 2*l.* 16*s.* 3*d.*, together with costs in respect of tithe

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rentcharge issuing out of the lands described in the schedule to the order due for the period of one half-year, and for the purpose of such recovery Mr. A. H. Joy, an officer appointed by the court, should distrain upon those lands and also on the lands which were liable to be distrained on under s. 85 of the Tithe Act, 1836, for the said sum, together with 12*l.* 13*s.* 4*d.* for costs, and 1*l.* 16*s.* 10*d.* being costs of the abortive auction sale and also the costs of the distress, and that for the making of such distress the order should be the officer's warrant. The order went on to provide that the goods and chattels seized might be sold by tender.

Thereupon the rule nisi for a certiorari in this case was obtained at the instance of Henry Arthur Ferridge.

The rule was moved upon the following grounds: That the learned county court judge had no jurisdiction to entertain or adjudicate upon the said application or to make the said order by reason of the facts that:—

(i.) the said learned judge had exhausted the powers conferred upon him by the Tithe Acts when he had made the order of May 4, 1931.

(ii.) there was no jurisdiction to make a second similar order for the recovery of tithe already ordered to be recovered under the said Acts.

(iii.) the order of November 9, 1931, exceeded the jurisdiction conferred upon the said learned judge in that—

(*a*) it failed to impose or respect or have regard to the limitation imposed by s. 10, sub-s. 2, of the Tithe Act, 1891;

(*b*) it included an order for sale by tender, which order could only be made (if at all) upon the application of the said officer and not upon the applicants' application, and only upon an application by the said officer in the proceedings in which the order of May 4, 1931, had been made:

(*c*) it exceeded the jurisdiction of the county court with regard to the costs recoverable by distress;

(*d*) by making the said order the learned judge brought into existence two orders for recovery by distress of the same tithe rentcharge at the same time.

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A. H. Armstrong (*Pritt K.C.* and *Duckworth* with him) showing cause. The order of the county court judge, dated November 9, is good. The county court judge was not functus officio when he had made the order of May 4, and, in any case, the order of November 9 was not a new and independent order, but was merely an amplification of the order of May 4, and a "direction of the Court" under s. 2, sub-s. 2, of the Tithe Act, 1891, to the officer of the court regarding how he should recover the money which he had been charged to recover under the order of May 4. If, for any reason, a sale on a first distress proves to be abortive, the officer of the court charged with the distress, or any other interested person, can apply to the court for further directions to fulfil the original order, and a second distress can be levied: *Lee* v. *Cooke.* (1)

By s. 81 of the Tithe Act, 1836, a tithe owner has the same right to distrain for arrears of tithe rentcharge as a landlord has for arrears of rent. A sale after a distress for rent need not be by auction: Bullen on Distress, 2nd ed., p. 191; and in the present case it was right that the sale should be by tender.

Rule 42 of the Tithe Rentcharge Recovery Rules, 1891, made under the Tithe Act, 1891, empowers the county court judge to make the order for payment of costs which he did.

H. J. Wallington in support of the rule. The county court judge had no jurisdiction to make the order of November 9. When he had made the order of May 4, he had done all that s. 2, sub-s. 1, of the Tithe Act, 1891, empowered him to do on the application of the tithe owner. An application for directions after an abortive sale, or in other circumstances which rendered it necessary, might perhaps have been made under s. 2, sub-s. 2, of the Act by the officer of the court charged with the recovery of the arrears, but the tithe owner could no longer properly make any application.

Here there was no evidence that Ferridge had done anything to render the sale by auction abortive and, in the absence of such evidence, a second distress was illegal: *Bagge* v. *Mawby.* (2)

(1) (1858) 3 H. & N. 203; 27 L. J. (Ex.) 337.

(2) (1853) 8 Ex. 641.

Under s. 82 of the Tithe Act, 1836, if the tithe rentcharge is in arrear and unpaid for forty days and there is no sufficient distress on the premises, a judge may issue a writ directed to the sheriff requiring him to summon a jury to assess the arrears of rentcharge, and thereupon the owner of the rentcharge may sue out a writ of habere facias possessionem directed to the sheriff commanding him to cause the owner of the rentcharge to have possession of the lands chargeable. It has been decided that in estimating whether or not there is sufficient distress on premises distrained on under this section, regard must be had to the value of the growing crops. The order for a writ under this section may be made ex parte: *In re Hammersmith Rentcharge.* (1) It was held in *In re Camberwell Rentcharge* (2) that the owner of the rentcharge may recover two years' arrear by assessment and writ of habere facias possessionem under s. 82, although he had not attempted to levy the arrear by distress under s. 81 except at the end of the last of the half-years. That case proceeded upon the basis that there must be a seizure, if there is anything to seize, before proceeding under s. 82.

The order of November 9 was not merely the giving of directions by the county court judge to the officer of the court under s. 2, sub-s. 2, of the Tithe Act, 1891. The order was the same as the order made on May 4, with three exceptions: in the first place, it was an order for a second distress instead of directing the sale of the first distress; secondly, the order of November 9 included an additional sum for costs; thirdly, the order of November 9 directed that the goods and chattels seized should be sold by tender instead of by auction. The application upon which the order of November 9 was made was a fresh application for the recovery of the same tithe rentcharge for the recovery of which the order of May 4 was made. Even if it were possible for Queen Anne's Bounty to make the fresh application, the county court judge had no jurisdiction to make the order of November 9, because the order of May 4 was still in existence. When Queen Anne's Bounty had made application for and

(1) (1849) 4 Ex. 87. (2) (1843) 4 Q. B. 151.

had obtained the order of May 4 they had exercised the rights given to them by s. 2, sub-s. 1, of the Tithe Act, 1891, and afterwards they could only apply for directions as to how that order should be carried out. The proper person to apply for directions was the officer of the Court. Only one application can be made for an order for recovery of tithe rentcharge. That defect cannot be cured by adding the registrar of the county court as an applicant for the order. The procedure laid down in the Tithe Acts for the recovery of tithe rentcharge must be strictly carried out. There is no provision in those Acts for a second distress; if there is not sufficient distress the owner of the tithe rentcharge must obtain possession of the land under s. 82 of the Act of 1836. There is nothing in the orders of either May 4 or November 9 to show that the proceedings for the recovery of the tithe rentcharge were commenced within two years from the date when such tithe rentcharge became payable.

Lord Hewart C.J. This is a rule nisi for a writ of certiorari directed to the judge of the county court of Kent holden at Ashford to remove into this Court a certain order made by him and dated on or about November 9, 1931, between Queen Anne's Bounty, applicants, and Henry Arthur Ferridge, owner, respondent. A long series of grounds is set out in the order, but when one examines the order they prove really to be particulars under the main proposition that the learned county court judge had no jurisdiction to entertain or adjudicate upon the said application, or to make the said order, by reason of the facts which are alleged.

Now the order referred to was in fact an order dated November 9, 1931, and upon its face it is described as an order that a second distress be levied for the sum of 2*l.* 16*s.* 3*d.*, together with costs in respect of tithe rentcharge issuing out of the lands described in the schedule to the order during the period of one half-year. Then the order goes on to direct that for the purpose of this recovery Mr. Joy, an officer appointed by the court, shall distrain upon the lands, and also upon the lands which are liable to be distrained upon

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under s. 85 of the Tithe Act, 1836, for the said sum, that is 2*l*. 16*s*. 3*d*., together with 12*l*. 13*s*. 4*d*. for costs and 1*l*. 16*s*. 10*d*. being costs of the abortive auction sale, and also the costs of the distress, and that for the making of such distress this order shall be the officer's warrant.

The affidavits show, and indeed it is common ground, that there was an order made on May 4, and the auction sale of the goods distrained thereunder was rendered abortive. It was made ridiculous by the offer of bids which were either obviously too low to be of any service, or too high to be taken seriously; and then came the application which matured in the order of November 9, designed to implement the abortive order of May 4; and it is said that the learned county court judge exceeded his jurisdiction in making the second order after he had made the first. [His Lordship read s. 2, sub-ss. 1 and 2 of the Tithe Act, 1891, and continued:] The question has been argued before us very clearly and fully on both sides, but it seems to me that there is no ground at all for the suggestion that the learned county court judge here either usurped or exceeded his jurisdiction. It appears to me to be very like the case of *Lee* v. *Cooke* (1), where it was held that, the purchaser not having paid, a second distress was lawful. That case went to the Exchequer Chamber, and Crompton J. (2) put the matter into a sentence: "If the lessee prevents the lessor making the first distress available, the latter may make a second distress." I think there were materials here from which the learned county court judge could hold that the applicant for this rule was a party to the concerted proceedings which made the original attempt to sell by auction abortive. But, even if it had been otherwise, I see no sufficient reason why there should not be a further application under the Tithe Act, 1891, for an order which would be in the circumstances effective. It has been argued that the effect of what has been done was really to make two orders for the same thing coincide, but that, I think, is an untenable argument. The second order was not a new order; it was described on its face as an order for a second distress, and the reason for making it was that the auction sale under the first order was abortive. The grounds which are alleged are various ways of stating and restating the same proposition, that the learned judge had no jurisdiction. It is said that he had exhausted his powers; that he could not make a second similar order; that the latter order exceeded his jurisdiction; and that it failed to impose or to have regard to the limitation imposed by s. 10, sub-s. 2, of the Tithe Act, 1891, that is to say, the limitation which provides that a sum on account of tithe rentcharge shall not be recoverable under this Act unless proceedings for recovery have been commenced before the expiration of two years from the date on which it became payable. I think a sufficient answer to that argument is that the order was made to recover the tithe rentcharge which was due, and there was no suggestion in the court below that the application was out of time, or that the period of two years was exceeded. Then it is said that the order of November 9 included an order for sale by tender. That is quite true, but in the circumstances that order seems to me to be free from objection. Finally, it is said that the order exceeds the jurisdiction of the county court with regard to the costs recoverable by distress—a matter entirely within the jurisdiction of the county court—and that by making the order the learned judge brought into existence two orders for recovery by distress of the same tithe rentcharge at the same time, which is a repetition of what has been said already.

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(1) 27 L. J. (Ex.) 337; 3 H. & N. 203.

(2) 27 L. J. (Ex.) 340.

The basis of certiorari is that there has been a usurpation of jurisdiction, or an act done in excess of jurisdiction, which is much the same thing. I have listened very carefully to the argument of Mr. Wallington, but I see no ground here for supposing that the learned county court judge did either of those things. I think that the order of November 9 was, in the particular circumstances of this case, within his jurisdiction, and, therefore, that this rule ought to be discharged.

AVORY J. I am of the same opinion. The substance of the objection which is taken in this case to the order made by the learned county court judge on November 9, 1931, is that he had exhausted his powers when he made the order of May 4, 1931. The grounds upon which it is said that he had no jurisdiction are numbered 1, 2, and 3 (*d*). In substance they come to the same point, that he had no jurisdiction to make a second order for the recovery of tithe already ordered to be recovered on May 4, 1931, and it is only saying the same thing when it is alleged that by making the said order he brought into existence two orders for recovery by distress of the same tithe rentcharge at the same time. It is to be observed that, under the statute of 1891, the officer of the court is, subject to the direction of the court, to have "the like powers of distraint for the recovery of the sum ordered to be paid as are conferred by the Tithe Acts on the owner of a tithe rentcharge for the recovery of arrears of tithe rentcharge, and no greater or other powers." That refers back to the Tithe Act of 1836, which by s. 81 gives the tithe owner the same right of distress as is given to a landlord for arrears of rent by the common law and by the statutes. So it appears to me that the questions in this case might really be answered by inquiring whether a landlord could in circumstances analogous to the present make a second distress for the same rent. Apart from the case of *Lee* v. *Cooke* (1), which is a clear authority that if the first distress is rendered abortive by the action of the tenant himself the landlord has a right to make a second, there appears to be authority for suggesting that a second distress is justified where there is not sufficient on the premises to satisfy the entire sum due; or, if the landlord abandons the distress, which is the same point, on the ground of insufficiency, he may make a second distress for the whole. So again it has been held that if he withdraws at the request of the tenant, or in consequence of a false statement made to him, he may make a second distress. I think it follows that he may make a second distress if there is, as I think there undoubtedly was in the present case, a combination of persons to set the law at nought. There was ample evidence upon which the learned county court judge could come to the conclusion

(1) 27 L. J. (Ex.) 337; 3 H. & N. 203.

that there was in this case a combination to set the law at nought. In giving his judgment, he is reported to have said: "Now the farmers, having by their conduct prevented the law from taking its course it is my duty to see to it that they do not ultimately succeed, and the only way I can deal with it now is that I must order a sale to take place. The previous sales were a mere farce and abortive, and in order that a proper sale shall take place, and seeing the conduct of the company at the other sales, I must order that the sale be by tender."

Now some further objections are set out in this rule under this heading: "The said order of November 9, 1931, exceeds the jurisdiction conferred upon the said learned judge in that *(a)* it fails to impose or respect or have regard to the limitations imposed by s. 10, sub-s. 2, of the Tithe Act, 1891." That is the section which imposes a limitation of two years for the recovery of tithe, and it is said that this order and the order of May 4, 1931, are both of them defective on their face, in that it does not appear at what date the tithe rent-charge became due, and, therefore, that it does not appear on the face of the order that it had become due within the two years. The answer to that point appears to me to be that the origin of the proceedings is to be found in a notice dated March 28, 1931, in which the solicitors for Queen Anne's Bounty gave notice that they would apply for an order for the recovery of 2*l.* 16*s.* 3*d.* due in respect of the tithe rent-charge issuing out of the lands described in the schedule to the notice for the period of one half-year, which became payable on October 1, 1930. So that there was on the original notice a clear specification of the date upon which this sum of money became due. That I think is a complete answer to the point that the order made in pursuance of that notice does not show that it was made within the two years.

The second point taken under this head is that the order of November 9, 1931, "included an order for sale by tender, which order could only be made (if at all), upon the application of the said officer and not upon the applicants' application, and only by an application by the said officer in the proceedings in which the order of May 4, 1931, had been made." I think that the answer to that is that the application in November was an application in the proceedings in which the order of May 4 had been made; and with reference to the point that the application is not made by the officer of the Court who is referred to in s. 2 of the Act of 1891, I see no force in that objection. The application was by the persons who were interested in getting the order made, and it was an application to the Court to give directions to its own officer. I do not think that the statute in any way requires that the officer shall be the person who is to actually appear in Court and orally make the application for directions to be given to himself. I see no reason why the tithe owner should not apply to the Court to give directions to its own officer.

For these reasons, while agreeing entirely with the reasons given by my Lord, I think this rule should be discharged.

MACNAGHTEN J. I am of the same opinion and for the same reasons. There is but one point on which I should like to add anything. Mr. Wallington contended strenuously that the Governors of Queen Anne's Bounty, having obtained the order of May 4, had no right to go back to the county court judge, and that, if any application was to be made in the matter, it could only be made by Mr. Joy, the officer appointed to levy the distress, and that the judge ought to have refused to listen to any one except Mr. Joy. In my view that contention is baseless. Speaking generally, any party in any matter before the court, and indeed any person who, although not a party, yet deems himself to be affected by an order, is at liberty to apply to the court as he may be advised. The order of May 4 having proved fruitless, the Governors of Queen Anne's Bounty were entitled to make an application to the court with a view to making it fruitful. Their application was in substance an application that the learned county court judge should give further directions to the officer of the court with a view to making the order of May 4 effective. I would only add this, that if it be true, as Mr. Wallington rather half-heartedly suggested, that Mr. Ferridge was no party to the conspiracy of his fellow farmers to set the order of the court at nought, he was a person who was very much interested in a proper price being secured for the goods which belonged to him.

I agree that the rule should be discharged.

Rule discharged.

Solicitor for applicant: *Edward F. Iwi.*

Solicitors for respondent: *Moodie, Sons & Brown, for Fielding & Pembrook, Canterbury.*

R. F. S.

TWYNHAM *v.* BADCOCK.

1932
April 5.

Adulteration—Addition of Preservatives—Proceedings against Retailer—Samples taken and Analysis made—Conviction—Subsequent Proceedings against previous Seller—No further Samples taken or Analysis made—Wilful Neglect to obey Regulations—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 130—*Public Health* (*London*) *Act,* 1891 (54 & 55 *Vict. c.* 76), *s.* 113—*Public Health Act,* 1896 (59 & 60 *Vict. c.* 19), s. 1 *sub-s.* 3—*Public Health* (*Regulations as to Food*) *Act,* 1907 (7 *Edw.* 7, *c.* 32), *s.* 1—*Food and Drugs* (*Adulteration*) *Act,* 1928 (18 & 19 *Geo.* 5, *c.* 31), *s.* 18—*Public Health* (*Preservatives, etc., in Food*) *Regulations,* 1925 (*St. R. & O.,* 1925, *No.* 775), *art.* 7.

An inspector appointed under the Sale of Food and Drugs Acts bought a sample of ground ginger from a retail shop. He complied with the provisions of s. 18 of the Food and Drugs (Adulteration) Act, 1928, with regard to the division of the sample into three parts, delivering one part to the seller and having an analysis made. Upon analysis the ground ginger was found to contain an added preservative, contrary to the provisions of the Public Health (Preservatives, etc., in Food) Regulations, 1925. The retailer was convicted upon an information charging him with the sale of the ground ginger to the prejudice of the purchaser under s. 2 of the Food and Drugs (Adulteration) Act, 1928. Subsequently, proceedings were commenced against the previous seller of the ground ginger for wilfully neglecting to obey the Public Health (Preservatives, etc., in Food) Regulations, 1925, by selling the ground ginger to the retailer. No further sample was taken of the ground ginger and no further analysis made. No part of the sample that was taken in the first instance was sent to the previous seller of the ground ginger. The magistrate refused to convict on the ground that the provisions of s. 18 of the Act of 1928 had not been complied with:—

Held, that the magistrate was wrong in holding that compliance with the formalities prescribed by s. 18 of the Act of 1928 was a condition precedent to the institution of proceedings against the previous seller for a sale to which art. 7 of the Regulations of 1925 applied. When the formalities prescribed by s. 18 of the Act of 1928 with regard to taking of sample, division and analysis had been complied with in proceedings as between the purchaser and the retailer, there was no necessity for those formalities to be repeated when proceedings were subsequently taken against the previous seller under art. 7 of the Regulations of 1925.

CASE stated by a Metropolitan Police Magistrate.

An information was preferred on April 1, 1931, by William Thomas Twynham (hereinafter called "the appellant"), an inspector appointed by the Stepney Borough Council under the Public Health (London) Act, 1891, the Public Health Act, 1896, and the Public Health (Regulations as to Food) Act, 1907, against Henry Vincent Badcock (hereinafter called "the respondent") for having on or about February 16, 1931, at No. 567 Commercial Road East, within the Metropolitan Police District, wilfully neglected to obey the Public Health (Preservatives, etc., in Food) Regulations, 1925, (1) by

(1) Public Health (Preservatives, etc., in Food) Regulations, 1925: Art. 4 (1.) "No person shall manufacture for sale or sell any article of food which contains any added preservative . . . ."

Art. 6 (1.) "Any officer authorised by the Minister and any officer of the local authority acting in the execution of these Regulations shall have power to enter at all reasonable times any premises where articles to which these Regulations apply are prepared, packed, labelled or stored.

(2.) The officer may take samples of any such article or of any substance used or capable of being used in the preparation of any such article and of any labels designed to be affixed to any such article or to any package or other receptacle containing such article, but shall if so required make reasonable payment for any samples so taken.

(3.) Where a sample is taken of an article to which these Regulations apply, the Sale of Food and Drugs, Acts, 1875 to 1907, shall apply as if the officer were an officer authorised to procure samples thereunder; and where an analysis is required for the purposes of these Regulations, the provisions of s. 14 of the Sale of Food and Drugs Act, 1875, as amended by s. 13 of the Sale of Food and Drugs Act, 1899, shall apply."

Art. 7: "Where it appears to any authority or officer whose duty it is to enforce these Regulations that an article has been sold within the district of the authority contrary to the provisions of art. 4 or 5 of these Regulations, the authority or officer may, instead of or in addition to selling to Myer Briski, of No. 567 Commercial Road East, ground ginger containing sulphur dioxide, which information was heard and determined on April 27, 1931, when the magistrate dismissed the information and ordered the appellant to pay the sum of ten guineas for costs.

The appellant, being dissatisfied and aggrieved with and by the said determination as being erroneous in point of law, duly applied to the magistrate to state and sign a case for the opinion of the High Court, in pursuance whereof this case was stated and signed by the magistrate.

Upon the hearing of the information the following facts were admitted or proved in evidence :—

(1.) The appellant was an inspector appointed by the Stepney Borough Council under the Sale of Food and Drugs Acts.

(2.) On February 26, 1931, John Youdle, acting on the instructions of the appellant, purchased six packets of ground ginger from Myer Briski at his shop at No. 567 Commercial Road East in the borough of Stepney.

(3.) The said six packets were taken from a cardboard box on the counter of the said shop. The said box was marked : "Finest Ground Ginger. Genuine. Yerand & Co., Honor Oak Road."

(4.) The said cardboard box, containing thirty-six packets of ground ginger, including the said six packets, was purchased on or about February 16, 1931, by Briski from the respondent who traded as Yerand & Co., and the packets were sold by Briski in the same condition as he received them.

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taking proceeding against the seller, take proceedings against any previous seller of the article notwithstanding that the sale by such previous seller took place outside the district of the authority, and for the purpose of any such proceedings the sale by the previous seller shall be deemed to have taken place within the district of the authority and the proceedings may be taken either before a court having jurisdiction within that district or before a court having jurisdiction in the place where the sale actually took place."

The Sale of Food and Drugs Act, 1875 (with the exception of ss. 30, 31 and 36) ; the Sale of Food and Drugs Act (Amendment) Act, 1879 ; the Sale of Food and Drugs Act, 1899 ; the Butter and Margarine Act, 1907 ; and the Sale of Food and Drugs Act, 1927, were repealed by the Food and Drugs (Adulteration) Act, 1928.

(5.) Immediately after the sale by Briski to Youdle the appellant entered the shop and informed Briski that he intended to have the ground ginger analysed, and duly divided the packets purchased into three parts, one of which was given to Briski, one sent to the public analyst, and one was kept by the appellant and produced at the hearing.

No portion of the sample was given or sent to the respondent.

(6.) The portion sent to the public analyst was analysed by him, and his certificate of analysis was attached to and formed part of the case.

(7.) The ground ginger contained 370 parts of sulphur dioxide in 1,000,000 parts of the sample analysed.

(8.) The sulphur dioxide was an added preservative within the meaning of the Regulations.

(9.) Briski was convicted upon an information charging him with the sale of the ground ginger to the prejudice of the purchaser under the Food and Drugs (Adulteration) Act, 1928.

(10.) The packets of ground ginger sold by the respondent to Briski were made up by him from a keg of ground ginger purchased by him from his brother, F. G. Badcock, as "genuine" ground ginger.

(11.) The respondent added nothing to the ginger purchased by him; sold it in the condition in which he received it; and relied upon the description "genuine" given on the invoice. He took no steps to ascertain if the ginger was pure.

(12.) F. G. Badcock imported the ginger from West Africa in root form, and it was ground for him by Barringer, Ld., at Hackney Wick. Nothing was added to the ginger by Barringer, Ld., or by F. G. Badcock.

(13.) F. G. Badcock had from time to time had samples of the ginger imported by him analysed, and such analyses never showed a greater proportion of sulphur dioxide than ten parts in 1,000,000. The last analysis was made about four years ago.

On behalf of the appellant it was contended:—

(*a*) That the sale by the respondent of the ground ginger without taking any steps to ascertain if it was free from any preservative other than by relying on the description "genuine" upon the invoice from a vendor who had made no analysis for four years, constituted a "wilful neglect" to observe the Regulations within s. 1, sub-s. 3, of the Public Health Act, 1896.

(*b*) That art. 7 of the Public Health (Preservatives, etc., in Food) Regulations made a sale by a seller previous to the retailer a separate and distinct offence to which art. 6 of the Regulations did not apply.

(*c*) That in the circumstances of this case there was no necessity to take a sample or make an analysis under art. 6 of the Regulations in respect of the sale by the respondent.

(*d*) That compliance with the formalities prescribed by s. 18 of the Food and Drugs (Adulteration) Act, 1928, was not a condition precedent to the institution of proceedings for a sale to which art. 7 of the Regulations applied.

On behalf of the respondent it was contended :—

(*a*) That there was no evidence of a "wilful neglect" to observe the Regulations.

(*b*) That art. 7 of the Regulations must be read with art. 6, and that observance of the formalities prescribed by s. 18 of the Food and Drugs (Adulteration) Act, 1928, was a condition precedent to the institution of proceedings for a sale to which art. 7 of the Regulations applied.

The magistrate found that the respondent had wilfully neglected to observe the Regulations, but he was of opinion that arts. 4, 5, 6 and 7 of the Regulations must be read together, and since the provisions of s. 18 of the Food and Drugs (Adulteration) Act, 1928 (1), had not been complied with he was of opinion that the condition precedent to the institution of proceedings against the respondent had not been observed and he accordingly dismissed the information.

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(1) Food and Drugs (Adulteration) Act, 1928, s. 18, sub-s. 1: "The person purchasing a sample of any article with the intention of submitting it to analysis shall, after the purchase has been completed, forthwith notify to the seller or his agent who sold the sample his intention to have it analysed by the public analyst, and shall then and there divide the sample into three parts, each part to be marked and sealed or fastened up in such manner as its nature will permit, and shall—(*a*) if required to do so deliver one part to the seller or his agent; (*b*) retain one part for future comparison; (*c*) if he thinks fit to have an analysis made submit one part to the analyst."

The question for the opinion of the Court was whether upon the above statement of facts the magistrate came to a correct determination in point of law.

Scholefield K.C. and *Erskine Simes* for the appellant. Under s. 130 of the Public Health Act, 1875, the Local Government Board had power to make regulations with regard to the treatment of persons affected with cholera or any other epidemic, endemic or infectious disease. That section was applied to London by s. 113 of the Public Health (London) Act, 1891. The Public Health Act, 1896, provided by s. 1, sub-s. 3, that "if any person wilfully neglects or refuses to obey or carry out, or obstructs the execution of, any regulation made under s. 130 or s. 134 of the Public Health Act, 1875, or in pursuance of either of those sections as extended to London by the Public Health (London) Act, 1891, and as amended by this Act, he shall be liable to a penalty. . . . ." The Public Health (Regulations as to Food) Act, 1907, provided by s. 1, sub-s. 1, that "the power of making regulations under the Public Health Act, 1896, and the enactments mentioned in that Act, shall include the power of making regulations authorising measures to be taken for the prevention of danger arising to public health from the importation, preparation, storage and distribution of articles of food or drink (other than drugs or water) intended for sale for human consumption, and, without prejudice to the generality of the powers so conferred, the regulations may—(*a*) provide for the examination and taking of samples of any such articles. . . . ." The Public Health (Preservatives, etc., in Food) Regulations, 1925, were made by the Minister of Health in the exercise of the powers conferred upon him by the foregoing statutes. Under the Sale of Food and Drugs Acts samples could only be taken when goods were sold, but art. 6 of the Regulations of 1925 gives power to the properly authorized officer to enter upon any premises where articles of food are prepared, packed, labelled or stored and take samples of any such article. That regulation is self-contained, and its object is to enable the proper officer to test articles of food while in a factory. In the present case the samples were taken under the provisions of the Food and Drugs (Adulteration) Act, 1928, and the proceedings against the retailer were for selling to the prejudice of the purchaser an article of food which was not of the nature, substance or quality of the article demanded by the purchaser, and the procedure prescribed by s. 18 of the Act of 1928 was duly carried out and the retailer was convicted. Proceedings were then commenced under a different Act against the respondent, the previous seller of the article, for wilfully neglecting to obey the Regulations of 1925. Art. 7 of the Regulations provides that " where it appears to any authority or officer whose duty it is to enforce these Regulations that an article has been sold . . . . contrary to the provisions of art. 4 or 5 of these Regulations, the authority or officer may, instead of or in addition to taking proceedings against the seller, take proceedings against any previous seller of the article." It is suggested that the inspector ought to have taken further samples of the article and had a further analysis made of those samples as regards the previous seller of the article. That procedure, however, would be impossible as between the inspector and the previous seller of the article, as the inspector did not buy anything from the previous seller. In these circumstances the procedure prescribed by s. 18 of the Act of 1928 is inapplicable, and the taking of samples, division of the samples, and the making of an analysis need not be gone through a second time in respect of the same article when proceedings are taken against the previous seller of the article after proceedings had been taken against the seller of the article. Sect. 18 only provides for the taking of samples of any article, division of the samples, and the making of an analysis as between the buyer of the article and the retailer. That section could not be complied with in the case of proceedings against a previous seller, because the buyer is to "*forthwith* notify to the seller or his agent who sold the sample his intention to have it analysed by the public analyst."

[AVORY J. Where is the difference between the present case and a case where a warranty has been given? When proceedings are taken against the person giving the warranty no fresh analysis is necessary.]

Where the procedure prescribed by s. 18 with regard to taking samples, division of the samples, and the making of an analysis has been carried out with regard to the retailer of the article there is no necessity to go through the procedure a second time when subsequently proceedings are taken against the previous seller of the article.

Fox-Andrews for the respondent. A warranty can only be relied on as a defence under s. 29 of the Act of 1928 if the defendant has within seven days of the service of the summons (inter alia) sent a notice of his intention to rely upon the warranty to the person from whom he received the warranty, and that person is entitled to appear and give evidence. In the present case, however, if the contention on behalf of the appellant is correct, the position of the previous seller would be much worse than the position of a person giving a warranty, because there is no provision requiring that notice shall be given to the previous seller of the proceedings against the retailer, and for allowing him to appear and defend such proceedings. The retailer of the article might not appear and might be convicted in his absence, and after a lapse of several months proceedings might be taken against the previous seller, who would probably then have no opportunity of challenging the analysis, as he would, in all probability, by that time have disposed of the bulk from which the articles sold to the retailer were taken, whereas in fact the retailer might himself have adulterated the article. It is suggested that if the authorized officer is required to carry out the provisions of s. 18 as regards the previous seller of the article, the Regulations would in the case of proceedings against the previous seller become unworkable, but the officer might without difficulty take two samples of the article.

[LORD HEWART C.J. You are assuming that the inspector at the time of taking the sample contemplated taking two sets of proceedings: against the retailer and against the previous seller. Under art. 7 of the Regulations proceedings are only to be taken against the previous seller of the article where it appears that an article has been sold contrary to the Regulations. That fact would only become apparent after the analysis had been made.

HAWKE J. If the inspector did what you suggest he would not be complying with s. 18. One-third of the sample must be delivered to the seller. You are suggesting that it should be sent to the wholesale seller, but he is not the seller of the article within s. 18.]

In this case there was a taking of a sample of an article to which the Regulations applied, and the officer when taking the sample intended to have an analysis made. By implication the Regulations provide that the procedure which must be complied with in the case of proceedings against the retailer of an article must also be complied with when proceedings are taken against the previous seller of the article.

There was no evidence upon which the magistrate could find that the respondent had wilfully neglected to observe the Regulations. He bought the article as "genuine" ground ginger, and relied upon that description in the invoice.

[AVORY J. Did the respondent give evidence before the magistrate?]

No, he did not give any evidence. He relied upon the arguments advanced on his behalf. In *In re Young and Harston's Contract* (1) Bowen L.J. defined the term "wilful default." He said that "default" means "nothing more, nothing less, than not doing what is reasonable under the circumstances," and that "wilful" merely means that "the person of whose action or default the expression is used, is a free agent, and that what has been done arises from the spontaneous action of his will." In *Reg.* v. *Senior* (2) Lord Russell of Killowen C.J. dealt with the meaning of the term "wilfully neglects." He said that

(1) (1885) 31 Ch. D. 168, 174.

(2) [1899] 1 Q. B. 283, 290.

"'wilfully' means that the act is done deliberately and intentionally, not by accident or inadvertence, but so that the mind of the person who does the act goes with it. Neglect is the want of reasonable care—that is, the omission of such steps as a reasonable parent would take, such as are usually taken in the ordinary experience of mankind." There was no evidence that the respondent did not attain to the standard laid down by Lord Russell of Killowen. It is true that he wilfully sold the article, but when he sold the article he did so relying upon the statement in the invoice that it was genuine, and he was not guilty of neglect because he did not have it analysed.

LORD HEWART C.J. This is a case stated by one of the Metropolitan Police magistrates. An information was preferred by the appellant, an inspector under the Public Health Acts, against the respondent "for that he did wilfully neglect to obey the Public Health (Preservatives, etc., in Food) Regulations by selling to Myer Briski . . . . ground ginger containing sulphur dioxide." The magistrate, having heard and determined the case, dismissed the information and ordered the appellant to pay the sum of ten guineas for costs. It is from that decision that this appeal by way of case stated is made.

Our attention has been directed to the various Acts of Parliament which deal with this matter, and I need not refer again to the Public Health Acts of 1875, 1896 and 1907; but it may be well to refer to the Regulations called the Public Health (Preservatives, etc., in Food) Regulations, 1925, made by the Minister of Health. It is provided by art. 7 of those Regulations that "where it appears to any authority or officer whose duty it is to enforce these Regulations that an article has been sold within the district of the authority contrary to the provisions of article 4 or 5 of these Regulations, the authority or officer may, instead of or in addition to taking proceedings against the seller, take proceedings against any previous seller of the article, notwithstanding that the sale by such previous seller took place outside the district of the authority . . . ."

In the present case there had been a sale of this ground ginger, the article sold had been divided and analysed in the manner provided by the statute, and the seller had been convicted. Thereupon further proceedings were taken against the previous seller, and on behalf of the appellant it was contended, first of all, that the sale by the respondent of the ground ginger, without taking any steps to ascertain if it was free from any preservative other than by relying on the description "genuine" upon the invoice from a vendor who had made no analysis for four years, constituted a wilful neglect to observe the Regulations within s. 1, sub-s. 3, of the Public Health Act, 1896. So far as that part of the matter is concerned the magistrate found against the respondent. He found that the respondent had wilfully neglected to observe the Regulations. Mr. Fox-Andrews frankly admits that in order to dispute that finding he must argue that there was no evidence upon which the magistrate could so find. It seems to me impossible to say that there was no evidence, and I do not think that that finding can be disturbed.

But, for the rest, the magistrate was of opinion that since the provisions of s. 18 of the Food and Drugs (Adulteration) Act, 1928, had not been complied with, the condition precedent to the institution of proceedings against the respondent had not been observed. Under that heading the contention of the appellant was that art. 7 of the Regulations made a sale by a seller previous to the retailer a separate and distinct offence to which art. 6 of the Regulations did not apply, and that in the circumstances of the case there was no necessity to take a sample or make an analysis under art. 6 of the Regulations in respect of the sale by the respondent. The appellant contended, further, that compliance with the formalities prescribed by s. 18 of the Food and Drugs (Adulteration) Act, 1928, was not a condition precedent to the institution of procedings for a sale to which art. 7 of the Regulations applied. Now it is not denied on behalf of the appellant that the taking of a sample, division of the sample, and the making of an analysis are necessary.

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v.
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Lord Hewart
C.J.

What is denied is that where the taking of a sample, the division of the sample, and the making of an analysis have taken place as between the purchaser and the retailer, they must be repeated after some interval of time when the inspector comes to deal with the wholesaler. In my opinion, there is no warrant for the contrary argument. The Regulations do not, I think, contemplate that there should be two processes of taking samples, division of the samples, and the analysis of the samples. They contemplate only that there should be one such process, and although a strong argument has been addressed to us on the ground that the wholesaler will be prejudiced unless the process is repeated, it seems to me that he is not in any worse position than the position of a person who gives a warranty relied upon by the retailer in a prosecution under the Sale of Food and Drugs Acts. I think the magistrate was misled into thinking that this process of the taking of a sample, division of the sample and the making of an analysis must be gone through a second time. It could not be gone through a second time immediately, and it seems to me that on the true construction of this Regulation it was not necessary to go through this process a second time at all. I think, therefore, that that part of the magistrate's decision was wrong and that this appeal ought to be allowed, and the case ought to go back to the magistrate with a direction to convict.

AVORY J. I am of the same opinion. With regard to the point which is taken first on behalf of the appellant in the case stated, I agree that it is not possible to say there was no evidence upon which the magistrate might find that the respondent had wilfully neglected to observe the Regulations. It may well have been open to him to have come to a different conclusion, but in view of the fact that the respondent was not called as a witness before him, and that the respondent had taken no steps to ascertain that the ginger was pure, I think it is impossible to say there was no evidence upon which he could come to the conclusion that he did.

Upon the main point, I think it must be taken that the magistrate has held that the provisions of s. 18 of the Food and Drugs (Adulteration) Act of 1928 must be complied with in any case where proceedings are taken under art. 7 of the Regulations against a previous seller of the article which has been purchased from the retailer, and which has already been analysed in accordance with the provisions of s. 18 of the Act of 1928. While it is true that the magistrate says he was of opinion that arts. 4, 5, 6 and 7 of the Regulations must be read together, I do not understand him to mean that he was of opinion that art. 6 of the Regulations required that there should be this further analysis, because it is obvious that art. 6 of the Regulations only applies where it is proposed to take a sample of articles which are upon premises where those articles are prepared, packed, labelled or stored; in other words, where it is proposed to take a sample of an article at a place where the article is actually made or warehoused. It cannot, therefore, have any application to a case where proceedings are merely taken under art. 7 of the Regulations, and if, as I think, the magistrate must be taken to have held that s. 18 of the Act of 1928 must be complied with, it seems to be clear upon looking at s. 18 that the present is not a case within s. 18 at all. It is not a case of a person purchasing an article with the intention of submitting it to analysis. It is a case where an article has already been purchased with the intention of submitting it to analysis, and under art. 7 of the Regulations it is proposed to take proceedings against a previous seller of that article. I am unable to see any distinction in principle between this case and a case where a warranty has been relied upon under the Act of 1928, and in which the same hardship might apply, as has been pointed out in this case, either to the retailer or to the wholesaler if any considerable lapse of time has taken place before the proceedings are instituted. For instance, if proceedings are taken against the retailer five months after he bought the article from the wholesaler, he might say that, although he had a written warranty with the article, it was so long ago that he had not kept it, and therefore was not able

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Avory J.

to produce it. So also in the case of the wholesaler where the defence of warranty is relied upon, it may be that he is placed in a difficulty by some delay in the proceedings. The answer to all these cases of hardship is that they only make bad law. I agree that the magistrate in this case fell into error, and that he ought to be directed to convict under the circumstances.

HAWKE J. I agree. I wish to add one word about the finding of wilful neglect. "Wilful neglect," in my opinion, is a thing which may vary very much. It must be something more than mere oversight. If it is more than a mere oversight then it is, in my opinion, open to the magistrate to convict. He may think that it is not much more than mere oversight. On the other hand he may think that it is a good deal more than mere oversight. His views about that would be reflected, I suppose, by the penalty he inflicts. It is quite impossible, in my opinion, to say in this case that there was no evidence upon which the magistrate could find as he did, and I agree that the appeal should be allowed.

Appeal allowed.

Solicitor for the appellant: *R. W. Dickeson.*
Solicitors for the respondent: *Neve, Beck & Crane.*

R. F. S.

WEDDELL AND ANOTHER *v.* ROAD TRANSPORT AND GENERAL INSURANCE COMPANY, LIMITED.

1931
Oct. 30;
Nov. 2.

Insurance (Motor-car)—Third Party Risk—Exemption from Liability when Risk covered by another Policy—Similar Clause in other Policy—Construction.

A motor-car accident policy issued by the respondent company to J. R. W. extended the insurance to a relative driving the car, provided that the latter was not entitled to indemnity for the same risk under another policy. L. W. W., a relative of J. R. W., while driving the car, injured a third party, who claimed damages. L. W. W. was himself insured with the C. insurance company against claims for injuries caused by him while driving a car not belonging to him, provided that he was not entitled to an indemnity in respect thereof from another company. The respondents denied liability on the ground of the proviso in their policy exempting them where the claimant was entitled to indemnity under another policy:—

Held, that on the proper construction of the policies, the insurance clause in each policy expressed to be cancelled by the co-existence of a similar clause in the other policy should be excluded from the category of co-existing cover, and that therefore the respondents, not being protected by their proviso, were liable.

SPECIAL CASE stated by an arbitrator.

On May 22, 1930, the respondents, the Road Transport and General Insurance Company, Ld., issued an insurance policy to the claimant, Justin R. Weddell. By condition 4 contained therein: "If at any time any claim arises under this policy there is any other existing insurance covering the same loss, damage or liability the company shall not be liable . . . . to pay or contribute more than its rateable proportion of any loss, damage, compensation, costs or expense. Provided always that nothing in this condition shall impose on the company any liability from which but for this condition it would have been relieved under the provisions of section II. of this policy." By section II. the respondents agreed with the claimant: "The company will indemnify the insured in the event of injury or damage caused by or through or in connection with any motor-car [described in the schedule] . . . . against all sums including claimant's costs and expenses which the insured shall become legally liable to pay in respect of (A.) Accidental bodily injury to any person other than a person engaged in and upon the service of the insured at the time of sustaining such injury."

It was further provided as follows: "In terms of and subject to the limitations of and for the purpose of this section the company will at the request of the insured treat as though he were the insured any relative or friend of the insured while driving such motor-car for social, domestic or pleasure purposes with the insured's general knowledge and consent, provided (*a*) that such relative or friend is not entitled to indemnity under any other policy." The car referred to in the above policy was at the time of the issue of the policy the property of the said Justin R. Weddell.

On August 19, 1929, the Cornhill Insurance Company, Ld., issued a motor insurance policy to the other claimant, Laurens Weaver Weddell, the brother of Justin R. Weddell, agreeing to indemnify him against all sums which he should become legally liable to pay by way of compensation for: "(A.) Accidental loss of life or bodily injury to any person, including any passenger, not in the service of the insured and not being a member of his family." By section L of the Cornhill policy the company further agreed with Laurens W. Weddell: "The indemnity granted . . . . is hereby extended to cover the insured while driving any private motor-car not belonging to him for pleasure or professional purposes if no indemnity is afforded the insured by any other insurance." By one of the conditions of the Cornhill policy the insured was required to give the company notice of any accident or claim within three days.

On August 4, 1930, Laurens W. Weddell, while driving the above car with the general knowledge and consent of his brother, accidentally injured one Frederick Ward. On August 6, 1930, a claim for damages on behalf of Ward was made on Laurens W. Weddell. The latter failed to give the Cornhill company notice of the accident or of the claim within three days thereof, and the Cornhill company repudiated liability on that ground. On August 16, 1930, Ward commenced an action against Laurens W. Weddell claiming damages. On November 5, 1930, Justin R. Weddell wrote to the respondent company requesting them to treat Laurens W. Weddell as himself in the matter of the above claim. The respondents repudiated all liability in respect of the claim. The claim was made by Justin R. Weddell as trustee for Laurens W. Weddell and by the latter on his own behalf.

The arbitrator, subject to the opinion of the Court, awarded that the respondents, the Road Transport and General Insurance Company, Ld., were liable to indemnify Laurens W. Weddell against one-half of all sums which he might become legally liable to pay in respect of the above action.

Ronald Smith for the claimants.

Willoughby Jardine K.C. and *Fox-Andrews* for the respondents.

Cur. adv. vult.

Nov. 2. ROWLATT J. In this case the claimant, Justin R. Weddell, held a motor-car policy issued by the respondents, the Road Transport and General Insurance Company, of which the following provisions are material. By section II. (A.): "The company will at the request of the insured treat as though he were the insured any relative or friend of the insured whilst driving such motor-car for social, domestic or pleasure purposes with the insured's general knowledge and consent, provided (*a*) that such relative or friend is not entitled to indemnity under any other policy." By condition 4: "If at the time any claim arises under this policy there is any other existing insurance covering the same loss, damage or liability the company shall not be liable . . . . to pay or contribute more than its rateable proportion of any loss, damage, compensation, costs or expense. Provided always that nothing in this condition shall impose on the company any liability from which but for this condition it would have been relieved under the provisions of section II. of this policy."

The claimant's brother, Laurens W. Weddell, had an accident while driving the claimant's car with the claimant's consent, and the claimant made the request to the company referred to in section II. that they should treat his brother as though he were the insured. Laurens W. Weddell also owned a car, in respect of which he held a policy of the Cornhill Insurance Company, which contained the following clause: "Section L: driving other cars. The indemnity granted under section A herein is hereby extended to cover the insured whilst driving any private motor-car not belonging to him for pleasure or professional purposes if no indemnity is afforded the insured by any other insurance." This policy contained no rateable proportion clause.

The question is, what is the position between the claimant, Justin R. Weddell, and the respondents, the Road Transport company. Laurens W. Weddell cannot recover against the Cornhill company, because he omitted to give them notice of the accident within three days, which by the Cornhill policy is a condition precedent to liability. The arbitrator has held that the Road Transport company is liable, but by reason of condition 4 liable only for a rateable proportion, treating the Cornhill policy as being an "other existing insurance" within condition 4.

For the claimant it was argued before me that he was entitled to recover in full; and the first point made was that the Cornhill policy was not an "other existing insurance" because, owing to the omission to give notice of the accident, liability under it could not be enforced. This, in my view, is too obviously unsound to require further notice. The position is to be regarded as at before the time for giving the notice expired.

The second point made, as I understood it, was that the Road Transport company were liable notwithstanding proviso (*a*) to section II. (A.) relating to collateral insurance, but only on the footing that, according to the decision of Roche J. in *Gale* v. *Motor Union Insurance Co.* (1), that proviso was cut down by the operation of the rateable proportion clause; and that the Cornhill company were not liable, because in their case there was no rateable proportion clause. Therefore, the argument concluded, the Road Transport company being alone liable, there was no other existing insurance, and

(1) [1928] 1 K. B. 359.

they were liable in full. It was pointed out by Mr. Jardine for the defendants that on this basis, if neither policy contained a rateable proportion clause, they would destroy each other entirely, and further, that such might be the position in this case, seeing that the proviso to the rateable proportion clause in condition 4 of the Road Transport company's policy seems to negative its use to cut down the proviso as to collateral insurance in the case of a friend or relative. However, he did not contend for this result, his clients being content to accept the decision of the arbitrator.

It is to be borne in mind that the risk covered by the clause as to a relative or friend is an extension of the scope of the policy. It gives protection to a person other than the assured. So, too, the clause in the Cornhill company's policy covering the assured when driving a car not belonging to him is an extension of the primary purpose of the policy, which is to cover risks to and in connection with a particular car or cars of the assured mentioned in the schedule. The general purpose of the proviso seems to be to make such extensions operate only as secondary cover, available only in the absence of other insurance regarded as primary, not including, one would suppose, other insurance also of a secondary character. In my judgment it is unreasonable to suppose that it was intended that clauses such as these should cancel each other (by neglecting in each case the proviso in the other policy) with the result that, on the ground in each case that the loss is covered elsewhere, it is covered nowhere. On the contrary the reasonable construction is to exclude from the category of co-existing cover any cover which is expressed to be itself cancelled by such co-existence, and to hold in such cases that both companies are liable, subject of course in both cases to any rateable proportion clause which there may be. In other words, it is true to say that the relative or friend is not "entitled to indemnity under any other policy" within the meaning of the Road Transport policy, and not "afforded" indemnity "by any other insurance" within the meaning of the Cornhill policy, when the other policy negatives liability where there are two policies. At

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that point the process must cease. If one proceeds to apply the same argument to the other policy and lets that re-act upon the policy under construction, one would reach the absurd result that whichever policy one looks at it is always the other one which is effective.

In these circumstances I come to the conclusion that the Cornhill company (apart from the omission to give the notice) were liable notwithstanding that their policy contained no rateable proportion clause, and I confirm the decision of the arbitrator. It does not escape me that in the result the Cornhill policy is disregarded for the purpose of section II., but not for the purpose of condition 4. The considerations applicable are, however, different.

Award affirmed.

Solicitors for claimants: *Redden & Booth.*
Solicitors for respondents: *Joynson-Hicks & Co.*

W. L. L. B.

DAMPSKIBSSELSKABET BOTNIA A/S *v.* C. P. BELL AND COMPANY.

1931
Nov. 27.

[1931. D. No. 93.]

Ship—Charterparty—" Weather working day "—" Weather "—Ice.

It was provided in a charterparty that a steamship should proceed to a port in Finland in mid-November and load pit-props at a specified rate " per weather working day " :—

Held, that days on which, owing to ice, loading could not proceed were not weather working days.

ACTION tried by Bateson J., sitting as an additional judge of the King's Bench Division.

By a charterparty dated October 27, 1930, in the " Wood Charter (Scandinavia and Finland) to the United Kingdom, 1924," form, it was provided that the steamship *Syndhavet*, belonging to the plaintiffs, Dampskibsselskabet A/S, who were a Danish firm, should go to one place in Middle Finland and there load from the agents of the charterers a full and complete cargo of short pit-props, and being so loaded should proceed to Cardiff and there deliver the cargo on being paid freight.

By clause 5: " At loading port the cargo shall be brought alongside the vessel at charterers' risk and expense. The cargo shall be loaded at the rate of 125 fathoms per weather working day on an average during the ordinary working hours of the port but according to the custom of the port. Sundays and general or local holidays excepted (unless used)." By clause 7 (*d*): " If after arrival the master for fear of vessel being frozen in deems it advisable to sail he shall be at liberty to leave without cargo . . . . or to leave with part cargo and to fill up for vessel's benefit at any port or ports whether such ports are in the course of the chartered voyage or not . . . ." By clause 18 an absolute lien on the cargo for dead freight was given.

The *Syndhavet* was ordered by the charterers to Mollersvik in Finland, which port was normally blocked with ice from about the middle of November. She arrived there on

November 8, 1930, and had to lie about three miles from the shore, the cargo being towed out to her in the form of rafts. Ice began to form, and from November 21 loading was impossible. Up to that time 394 fathoms had been loaded out of the 750 fathoms which would have constituted a full and complete cargo. At the request of the master the charterers gave him a letter on that day saying: "As we now, on account of weather hindrances (ice), consider ourselves unable to supply more props in Mollersvik, we are ready to clear your vessel, in accordance with the charterparty, with the approximate 400 fathoms loaded." The master left on November 22, and the part cargo was brought to Cardiff, and, under ss. 492 to 496 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), it was deposited with the dock authority, the master claiming a lien for dead freight. The defendants then paid the dock authority the amount of the lien and obtained a release of the pit-props, the authority holding the money to abide the decision in the case.

G. St. Clair Pilcher for the plaintiffs. The defendants under the charterparty were under an absolute obligation to load a full and complete cargo, and that obligation is not qualified anywhere in the charterparty. No doubt fulfilment of that obligation had become impossible owing to ice, but the charterers had ordered the ship to a port in which at that time of the year there was danger from ice, and they chose to take the risk. The defendants could not rely on clause 7 (*d*) of the charterparty, because the master had not exercised his option to leave from fear of the vessel being frozen in, which is the case dealt with in clause 7 (*d*), but because the charterers told him that they could not load any more. Nor could they rely on clause 5, because the days when no loading took place were "weather working days"—i.e., days on which loading was not prevented by bad weather—per Walton J. in *Bennetts & Co.* v. *Brown.* (1) Loading was prevented by ice, not by bad weather. Ice is not weather but the consequence of weather, just as trees blown down by the wind and blocking road transport are not weather but the consequence of weather. If a charterer wishes to protect himself against difficulties caused by ice he must do so in express terms.

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(1) [1908] 1 K. B. 490, 496.

H. U. Willink for the defendants. Ice is "weather," being the physical effect of cold. Rain is weather, and ice is only colder rain.

Pilcher in reply. By "weather" something which may or may not occur is meant, but at the time of the year in question in the port of Mollersvik, the presence of ice was certain.

BATESON J. I think the plaintiffs in this case fail. The action is an action by shipowners against cargo owners to recover dead freight on the steamship *Syndhavet*, which was chartered to carry pit-props from a port in Middle Finland to Cardiff. On November 8, 1930, the ship arrived at Mollersvik, which is a port in Middle Finland. At Mollersvik the cargo has to be brought down a river to the mouth of the river, and the ship lies at an anchorage one or two, or possibly three, miles out in the bay, and the method of loading is by towing rafts of timber from the mouth of the river out to the ship, into which it is loaded. Any part of the raft that is not completely loaded in the day is towed back again, because it is not safe to leave it alongside the ship. The ship arrived at this port in the afternoon, and the following day was Sunday. From November 10 to November 16 there was only one day on which the vessel could be loaded, November 11, and then she loaded 136 fathoms. There was some question whether she ought to have loaded a little more on the Saturday, but the tug towing the raft out got ashore owing to a snow-storm. That does not look as if it was a very good day for loading, and nothing was loaded on that particular day. It was very unfortunate from the point of view of the ship, because if it had been fine weather she would have been loaded and would have got away. On Sunday, November 16, which was not a working day, ice began to appear. A little cargo was loaded on November 17 and 18, but the ice set in substantially, and, with the exception of some small parcels, no more loading was done before November 21. Ice was

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the cause which prevented any more cargo being brought to the ship from the storage place, and the port was closed on November 18, for practical purposes, for the winter. It was obvious that no more cargo could be given than what the shippers had managed to get from another small place where there was a small store, and it was no good the ship waiting any longer. The master and his owners wanted to get a full cargo, and if he did not get a full cargo he wanted dead freight, and in order to protect himself the master would not go without getting a letter from the shippers to say that it was not possible to ship any more cargo. Thereupon the shippers gave him a letter saying: "As we now, on account of weather hindrances (ice), consider ourselves unable to supply more props in Mollersvik, we are ready to clear your vessel, in accordance with the charterparty, with the approximate 400 fathoms loaded. PS.—On account of the reason mentioned above we are now also unable to deliver any props from any other place stipulated in the charterparty." Of course, if the master had stayed very much longer he would have been frozen in himself. He had to go, and there was no chance of his getting any more cargo. In fact, 394 fathoms were loaded, leaving 356 fathoms short. The vessel proceeded to Cardiff on November 22; she arrived at Cardiff on November 27; the claim was made for dead freight; and a deposit was made under s. 495 of the Merchant Shipping Act, 1894, on December 2.

The charterparty was a charterparty made on October 27, 1930, a fortnight before the vessel arrived at the port of loading, and it is the Chamber of Shipping Wood Charter (Scandinavia and Finland) to the United Kingdom, 1924, form (the "Scanfin"). It was agreed between Messrs. Galbraith, Pembroke & Co., agents for the owners, and Messrs. A/B Pitwood, the charterers, that the vessel should proceed to one place in Middle Finland and load a full and complete cargo of short pit-props, and being so loaded should proceed to Cardiff. The other clauses of the charterparty that have been referred to are, firstly, clause 5: "At loading port the cargo shall be brought alongside the vessel at charterers' risk and expense. The cargo shall be loaded at the rate of 125 fathoms per weather working day on an average during the ordinary working hours of the port . . . . Sundays and general or local holidays excepted (unless used)." Then clause 7 is the ice clause: "(*a*) If when the vessel is ready to proceed from her last port, or at any time during the voyage to the loading port the shipowner is informed by the shipper whose name first appears in the margin hereof and the shipowners' agent at port of loading that in their opinion the port is not accessible and/or the shipment of the goods is not practicable by reason of ice, the charter shall be cancelled thence-forward. (*b*) If upon vessel's arrival off the port or so near thereunto as she can get, ice, in the opinion of the master, prevents the vessel entering the port of loading, the charter shall be cancelled thence-forward and the shipowner shall advise the charterers by telegram. . . . (*d*) If after arrival the master for fear of vessel being frozen in deems it advisable to sail, he shall be at liberty to leave without cargo, in which case the charter shall be cancelled . . . . by telegram accordingly, or to leave with part cargo and to fill up for vessel's benefit at any port or ports whether such ports are in the course of the chartered voyage or not . . . ." and then the clause goes on to deal with leaving with part cargo.

Now the question which I am asked to decide in this case really boils down to this: what is the meaning of "weather working day" in clause 5? Mr. Pilcher for the plaintiffs, the shipowners, points out that clause 7 (*d*), the sub-clause in the ice clause, does not apply to this shipper; that it is only put in for the protection of the shipowner. Mr. Willink for the defendants, on the other hand, says: "That is all very well, but the corresponding protection for the shipper is under clause 5, which regulates my duty to put cargo on board the ship on weather working days only." That is really the dispute between the parties. Mr. Pilcher says that clause 5 merely relates to the rate for loading, and that it does not negative or cut down the obligation to load a full and complete cargo; that the shipper is bound to ship at the fixed rate per weather working day, and he says that ice is not weather; that it may be the result of weather, but that it is not weather; and that on a perfectly fine, bright, cold day ice would not prevent the vessel being loaded; that if they had wanted to except ice from the loading they could have said it in that clause, or they could have made it clear elsewhere in the charterparty, and they have not chosen to do so. He goes on further to say that there is no reported case where it has ever been held that when loading is prevented by ice it is not a weather working day. Of course, the answer to that, as is often made where no case on the point can be found in the books, is that nobody ever thought of raising it before. But the question has arisen now, and I have to determine it, and the way I approach it is this. Is a day on which ice prevents loading a weather working day within the meaning of this charterparty? This was a charterparty for a vessel to go to an ice port at a very late period in the season. One of the worst things in an ice port is, I suppose, that ice prevents the loading; and I think that where, in such a charter as this, for such a place as this, the parties have agreed that the loading is only to take place on weather working days, if the conditions are such that the cargo cannot be got out of the ice in order to be taken to the ship, that day will cease to be a weather working day. I think that the formation of ice by cold which prevents the loading is weather, and that the meaning of the phrase "weather working day," between business men dealing with this kind of charterparty, must relate to prevention from loading by ice.

Passages in the correspondence have been referred to where the parties themselves talked about it being the weather that prevented the loading, or "if the weather turns mild we might get on with the loading." The actual wording of the notice which the master got the shippers to give him says "weather hindrances," and I think in ordinary English the meaning of the phrase in this charterparty is that the ice, such as prevented the loading in this case, was weather preventing the loading, and that the exception or the excuse for not loading more is because there were no weather working days on which it could be loaded. Mr. Willink pointed out that if ice is not weather, the waves which are produced by the wind, and so prevent lighters or rafts from getting alongside vessels, could not be said to be weather, because it was waves and not wind. Perhaps that is somewhat analogous. I think weather means loading weather, and if you have ice which prevents you loading you are stopped from loading by the weather being unfit for loading. In other words, you have not got a weather working day.

Mr. Pilcher says that there is only one case—namely, *Bennetts & Co.* v. *Brown* (1), where the words "weather working day" have ever been interpreted. It is a decision of my great master in the law, Walton J., and therefore I pay unbounded respect to it. He says (2): "I think it has a natural meaning, viz., a day on which the work of discharge—it might be of loading, but in the present case it is of discharge—is not prevented by bad weather." Mr. Pilcher says that this was not bad weather, that ice is present very often in beautiful weather; but I think that in this charterparty it is bad weather when ice prevents loading. Scrutton L.J., in his book on Charterparties, 13th ed., p. 365, says that "'weather working days' means days on which the weather allows working." Personally, I do not see very much difference between what Walton J. says and what Scrutton L.J. says. I am satisfied in this case that the proper interpretation of these words is that which I have given to them.

There will be judgment for the defendants, with costs.

Judgment for defendants.

Solicitors for plaintiffs: *William A. Crump & Son, for Gilbert Robertson & Co., Cardiff.*

Solicitors for defendants: *Botterell & Roche, for Botterell, Roche & Temperley, West Hartlepool.*

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(1) [1908] 1 K. B. 490.

(2) [1908] 1 K. B. 496.

W. L. L. B.

C. A.
1932
April 25.

LEON AND OTHERS *v.* CASEY.

[1932. L. 686.]

Insurance (Marine)—Practice—Discovery—Affidavit of Ship's Papers—Transit by Land and Sea—Loss on Land—Policy substantially of marine Insurance.

By a policy in the form of a Lloyd's policy of marine insurance underwriters insured certain goods and merchandise upon the steamship *L.* or other steamers or conveyances at and from Cairo to Jaffa. The risks insured against included damage by fire, and the policy contained a warehouse to warehouse clause. The adventure consisted of a journey by land from Cairo to Alexandria and thence by sea on the steamship *L.* to Jaffa. In an action upon the policy the assured alleged that the goods had been damaged by fire in the course of transit by lorry from Cairo to Alexandria:—

Held, that upon a summons for directions an order was properly made that the plaintiffs should make an affidavit of ship's papers, the policy being substantially one of marine insurance.

Harding v. *Bussell* [1905] 2 K. B. 83 followed; *Henderson* v. *Underwriting and Agency Association* [1891] 1 Q. B. 557, and *Tannenbaum & Co.* v. *Heath* [1908] 1 K. B. 1032, considered.

APPEAL from an order of MacKinnon J. ordering that the plaintiffs should make an affidavit of ship's papers. (1)

The plaintiffs were Joseph Leon, David Elhay, and Jacques Manoukian (carrying on business in Egypt as Leon Elhay & Manoukian), and Esther Crespin, widow, the assignee of the other plaintiffs. They brought the action for the loss by fire of certain goods in transit by lorry from Cairo to Alexandria on or about June 9, 1931, which had been insured under a policy of insurance dated July 24, 1931, subscribed by the defendant and other underwriters.

On June 5, 1931, Cox & Kings (Agents), Ld., issued to the plaintiffs a certificate numbered 141390 stating that as agents for the plaintiffs they had effected insurance on certain bales and cases of ties, linen, cotton piece goods, hosiery and shirts from Cairo to Alexandria by motor lorry, whilst there, and thence to Jaffa per steamship *Lotus*. The "amount insured (and so valued)" was 2257*l.* (1) The risks insured against were "war, marine, and transit by road risks." The certificate stated that the insurance was covered by a duly stamped policy held by the said agents to the extent of the interest covered by the certificate.

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(1) The present form of an order for an affidavit of ship's papers will be found in the Annual Practice, 1932 (the White Book), pp. 1659, 1660, and in the Yearly Practice of the Supreme Court, 1932 (the Red Book), vol. 2, p. 2455.

The policy was a Lloyd's policy. It was dated London, July 24, 1931, and it declared that Cox & Kings (Agents), Ld., as agents in their own name and in the names of all to whom it might appertain made assurance at and from Cairo to Jaffa upon goods and merchandise upon the steamship *Lotus* and/or steamers and/or conveyances. The goods and merchandise were specified as hosiery valued at 2257*l.* The risks insured against included fire. The policy referred to "certificate No. 141390 dated June 1 (*sic*), 1931." It was subject to Institute Time Clauses as attached, of which No. 6 was "The risks covered by this policy attach from the time the goods leave the shipper's or manufacturer's warehouse at the port of shipment . . . . and continue during the ordinary course of transit, including customary transhipment if any, until the goods are safely deposited in the consignee's or other warehouse at the destination named in the policy." . . . .

Upon a summons for directions MacKinnon J. ordered that the action should be transferred to the Commercial List, that the plaintiffs should give security for costs and should make an affidavit of ship's papers. The plaintiffs appealed against so much of the order as directed discovery of ship's papers.

H. G. Robertson for the appellants. This is an action upon a policy of insurance to recover a sum of money in respect of a loss by land which the underwriter has insured against. It has nothing to do with marine risks. The journey from Cairo to Jaffa consists of a land journey from Cairo to Alexandria followed by a journey by sea from Alexandria to Jaffa. If two policies had been taken out by the appellants, one in respect of the land journey and the other in respect of the journey by sea, the appellants suing upon the first policy could not have been compelled to make an affidavit of ship's papers. It makes no difference in principle if, instead of having the two policies on separate pieces of paper, they are both contained in one document. The order for ship's papers has never been made in an action on a policy of insurance against loss by land. It is strictly confined to actions upon policies of marine insurance: *Henderson* v. *Underwriting and Agency Association* (1); *Village Main Reef Gold Mining Co.* v. *Stearns* (2); *Schloss* v. *Stevens.* (3) The question in each case is, what is really the nature of the insurance upon which the action is brought: *Tannenbaum & Co.* v. *Heath* (4), per Lord Alverstone C.J. In this case the action is plainly brought upon an insurance of goods in transit by land; the goods were lost before they ever reached the sea.

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(1) The forms of the certificate and policy supplied to the Lords Justices varied from each other in certain immaterial particulars.

[Arnould on Marine Insurance, §§ 1271, 1272, were also referred to.]

W. L. McNair for the respondent. The question to be decided is not what is the nature of the insurance on which the action happens to be brought; it is what is the nature of the insurance as a whole? Is it substantially a policy of marine insurance? If it is, the affidavit of ship's papers should be ordered: *Harding* v. *Bussell.* (5) The judgment of Lord Alverstone C.J. in *Tannenbaum & Co.* v. *Heath* (6) is to be supported, if at all, on the ground that there were in truth four insurances embodied in one policy, and it could not be said that the contract of insurance was substantially one of insurance of a marine adventure. The policy in the present case falls within the definition of a contract of marine insurance in s. 2 of the Marine Insurance Act, 1906.

H. G. Robertson in reply.

SCRUTTON L.J. This is an appeal from an order of MacKinnon J. in an action against a Lloyd's underwriter in

(1) [1891] 1 Q. B. 557.
(2) (1900) 5 Com. Cas. 246.
(3) (1905) 10 Com. Cas. 224.
(4) [1908] 1 K. B. 1032, 1037.
(5) [1905] 2 K. B. 83; 10 Com. Cas. 184.
(6) [1908] 1 K. B. 1032.

which the writ was indorsed: "The plaintiffs' claim is for the loss by fire of goods in transit by lorry from Cairo to Alexandria on or about June 9, 1931, insured under a policy of insurance dated July 24, 1931, and subscribed by the defendant and other underwriters. The plaintiff Esther Crespin sues as assignee of her co-plaintiffs." MacKinnon J. has ordered what is known as an affidavit of ship's papers.

The plaintiffs appeal from that order on the ground that this is not a case for an affidavit of ship's papers, and that the ordinary affidavit of discovery is all that the plaintiffs are entitled to. I need hardly explain that, whereas the usual order for discovery is made after the pleadings are closed, and relates only to documents which are or have been in the possession of the party giving discovery, an order for ship's papers may be made before the statement of claim is delivered and covers a much wider range, in that it requires the plaintiff to produce from all persons interested, not only in the policy but in the adventure to which the policy relates, all material documents in their possession, or else to show that he has tried and failed to get them. Those who are unfamiliar with marine insurance feel a difficulty in understanding why underwriters should be more favourably treated than other litigants, and indeed it is not easy to see the logical difference between those cases in which it has been held that the order for ship's papers must be made and those in which the decision has been that it need not be made.

The origin of the order for ship's papers goes back to the time of Lord Mansfield. In those days the Courts of common law did not give discovery of documents. If this was wanted the only means of getting it was by a bill in equity, and very often an action at law was delayed while the necessary proceedings in equity were taking their course. In consequence partly of this inconvenience and partly of the fact that insurance has always been regarded as a transaction requiring the utmost good faith between the parties, in which the assured is bound to communicate to the insurer every material fact within his knowledge not only at the inception of the risk, but at every subsequent stage while it continues, up to and including the time when he makes his claim, the Common Law Courts invented the order for ship's papers, an order which is made as soon as the writ is issued in an action on a policy of marine insurance. The case which is always referred to, *Goldschmidt* v. *Marryat* (1), in the Court of Common Pleas, shows what was happening. There the plaintiff desired to have his case advanced so that he might go to trial before the defendant could file his bill for discovery in equity. Sir James Mansfield, the Chief Justice of the Common Pleas, sent Campbell, who was then a reporter of cases at Nisi Prius in the King's Bench and Common Pleas, to the Court of King's Bench, as amicus curiae, to inquire there what the practice was upon this subject. Mr. Campbell having done so, reported as follows: "Campbell, upon his return, certified, that Lord Mansfield had laid it down as a rule, that, although he would not wait for any proceedings in equity, he would on no account take a case out of its course at Nisi Prius for the purpose of defeating them; and that the same rule had been observed by his two noble and learned successors, Lord Kenyon and Lord Ellenborough." The report proceeds: "In the course of the discussion it was stated, on the part of the defendants, that they had applied to Heath J. for an order upon the plaintiff to produce upon affidavit all the papers in his possession concerning the cause, but that that learned judge had refused to make any order, except for the production of specific papers mentioned by the defendant, or generally, for all papers without an affidavit. Sir James Mansfield said, I have great difficulty in believing this statement to be correct. I have made fifty such orders since I became Chief Justice of this Court. I was, to be sure, a good deal surprised when they were first applied for, as nothing of the sort was known when I practised in the King's Bench. But I consulted the other judges, and found they had become extremely common. I think they have been very properly introduced; as they often obviate the necessity of going into a Court of Equity, and save a great deal of delay, expense, and litigation. Without requiring the plaintiff

(1) (1809) 1 Camp. 559.

to produce the papers on affidavit, the order would be nugatory. He would only select such as could be of no use to the opposite party. Nor would it answer to limit the order to such papers as are specifically named; since there may be others which the party has not the means of describing, and which may be got at through the medium of a Court of Equity."

From that time there has been a regular practice in actions upon policies of marine insurance, or, one may also say, on policies insuring adventures involving marine risks, to make an order, as soon as the plaintiff has issued his writ, that he shall disclose to the other side all material documents, not only those which he has or has had in his own possession, but those which persons interested in the adventure—not merely interested in the policy—must also have or have had in their possession. If he cannot get these last mentioned documents he must show on affidavit that he has tried and is unable to get them.

In the time of Sir James Mansfield insurance was almost entirely marine. As time went on insurance of other kinds came into use, and large companies grew up which dealt with a bulk of insurance which was not marine in any sense, and where the adventure never involved any marine risk. But Lloyd's confined themselves to marine insurance until enterprising underwriters began insuring all sorts of risks which their predecessors never thought of, such as risks of loss through frauds of servants or of cricket matches being spoilt by rain, and I know not what.

Now, when the Judicature Act, 1873, was passed, and when the Rules of Court were made under it, some of the judges took the view that the practice of making orders for the discovery of ship's papers had been superseded by the new practice under the Rules of Court, and in *Fraser & Co.* v. *Burrows* (1) Cleasby B., of whom Lord Esher has certified, in *China Transpacific Steamship Co.* v. *Commercial Union Assurance Co.* (2), that he was beyond all others conversant with this head of the law, had made an order for ship's papers; but that order was reversed by Kelly C.B. and

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(1) (1877) 2 Q. B. D. 624.

(2) (1881) 8 Q. B. D. 142, 146.

Field J. Within three months, however, another order in Chambers for ship's papers came before Kelly C.B. and Cleasby B., in *West of England and South Wales District Bank* v. *Canton Insurance Co.* (1), and Kelly C.B., having further considered the matter with the assistance of Cleasby B., changed his former opinion and held that the practice of ordering ship's papers still survived and should be followed. And in *Graham Joint Stock Shipping Co.* v. *Motor Union Insurance Co.* (2) this Court held that *Fraser & Co.* v. *Burrows* (3) was wrongly decided, and that the order for ship's papers still continued in its old form. I should add that in *China Transpacific Steamship Co.* v. *Commercial Union Assurance Co.* (4) Brett L.J. gave the reasons why the practice of ordering an affidavit of ship's papers in cases of marine insurance came into use, and the language of Brett L.J. in that case was approved in *China Traders' Insurance Co.* v. *Royal Exchange Assurance Corporation.* (5)

As the scope of insurance grew at Lloyd's, and underwriters began to insure risks which were sometimes only partly marine risks and sometimes not marine risks at all, the question soon arose how far the order for ship's papers was applicable to actions on the more novel contracts of insurance. It has always seemed to me that if the justification of the order was the duty of the assured to disclose to the underwriters all material facts, a similar order ought logically to be made in all actions against insurers, for that duty applies to all insurances; but the practice has not been logical and the order has not been extended to actions other than those on policies of marine insurance. As far as I know, the first case in which the question arose was *Henderson* v. *Underwriting and Agency Association* (6), in which title deeds were insured on a transit by post. One cause of difficulty was that it was not clear how the documents were in fact conveyed. They were insured against risks and perils of transit and conveyance (7) from Cadiz to

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(1) (1877) 2 Ex. D. 472.

(2) [1922] 1 K. B. 563.

(3) 2 Q. B. D. 624.

(4) 8 Q. B. D. 142, 145.

(5) [1898] 2 Q. B. 187.

(6) [1891] 1 Q. B. 557.

(7) See 60 L. J. (Q. B.) 406.

Alexandretta on the coast of Syria, but there was no evidence, so far as I remember, what method of transit or conveyance the Post Office authorities proposed to adopt. In an action on the policy, an order for ship's papers having been refused by the Master, Denman J. on appeal referred the question to the Divisional Court, and there Cave and Jeune JJ. made a compromise order for discovery before pleadings, giving some effect to the duty of the assured to disclose but not the full effect which would have been given by an affidavit of ship's papers. That case was followed by Kennedy J. in *Village Main Reef Gold Mining Co.* v. *Stearns* (1), in which goods were insured from mines in South Africa to London, and the loss occurred on the railway on the way to the port of shipment. The next case, *Harding* v. *Bussell* (2), concerned goods in transit from various places in England, the furthest being Hull, to various ports, London or Southampton, and thence by sea to South Africa. It came before Mathew L.J., who was most experienced in marine insurance. It was argued that, as the policy covered risks partly by land, an order for ship's papers ought not to be made. Mathew L.J. said (3): "The rule equally applies where the transit, though partly by land, is covered by a policy such as a policy in this form, which is substantially a policy of marine insurance. I am, therefore, unable to concur in the decision of Kennedy J. in *Village Main Reef Gold Mining Co.* v. *Stearns* (1), or of the Divisional Court in *Henderson* v. *Underwriting and Agency Association* (4), if the latter case is to be regarded as a departure from the ordinary practice. I can see no reason why the ordinary practice should not be followed, though part of the transit covered by the policy be by land." The passage in the Law Reports (5) is not so strongly expressed—whether the learned judge revised the report I do not know. It runs thus: "If I were called on to express an opinion I should doubt whether the decision" —in *Henderson* v. *Underwriting and Agency Association* (4)—

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(1) 5 Com. Cas. 246.

(2) [1905] 2 K. B. 83; 10 Com. Cas. 184.

(3) 10 Com. Cas. 188.

(4) [1891] 1 Q. B. 557.

(5) [1905] 2 K. B. 86.

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"was a correct one. It appears to have influenced my brother Kennedy in the case that came before him, and he appears to have treated it as an authority that wherever any portion of the venture is a transit by land there is no right to an affidavit of ship's papers. In that view I cannot concur. As I have said, the reasons for ordering an affidavit of ship's papers apply equally in a case where a part of the transit is by land. The other cases which were cited as authorities for the general rule need not be discussed, and I see no reason why the ordinary practice should be departed from in this case." Very soon after this the same learned judge decided the case of *Schloss* v. *Stevens* (1), where there was an insurance of goods at and from on board the ship, at her port of discharge, to any place or places in the interior of the Republic of Colombia. It appeared that the transit was by railway, mule pack, and river steamer, and that the delay which had happened and caused the loss was owing to a breakdown of the railway. Mathew L.J. held that the affidavit of ship's papers was ordered in cases of marine insurance and not in cases of inland transit. How it would have been if the transit by railway, mule pack, and river steamer had involved a passage up the Amazon, where a vessel may suffer all imaginable perils of the sea, I have often wondered. However, it did not, and being as it was, Mathew L.J. said the case was not one for an affidavit of ship's papers.

Then came the case of *Tannenbaum & Co.* v. *Heath* (2), also in the Court of Appeal. One and the same policy included insurances against four different risks, of which three had nothing to do with marine insurance. The first insurance was against fire occurring in a place inland; the second was what is called an "in and out" policy, insuring the fidelity of servants or messengers while taking money in and out of a bank; the third was against risk of theft of goods the property of the assured in course of transport by registered mail, express or messenger, to or from any salesman or customer; the fourth was against risks in transport by sea. The risk which actually happened was a fire on land. The insurers argued that the policy covered a marine risk and therefore the assured must make an affidavit of ship's papers. The assured conceded that the argument of the insurers might have had much force if the risk in question had been a marine risk, but it was not. The Court, though giving somewhat diverging reasons, assented on the whole to the argument of the assured and declined to make an order for ship's papers.

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(1) 10 Com. Cas. 224.

(2) [1908] 1 K. B. 1032.

I need not go through the judgment in *Graham Joint Stock Shipping Co.* v. *Motor Union Insurance Co.* (1), where I gave, perhaps more briefly, the history which is set out in great detail in Arnould on Marine Insurance, §§ 1271 and 1272; but I wish to observe that one of my expressions in that case was misunderstood by counsel in *Teneria Moderna Franco Española* v. *New Zealand Insurance Co.* (2), who was for limiting the scope of the discovery to documents in the possession of persons interested in the insurance merely. The Court of Appeal dissented from that view, and took occasion to say that the discovery included documents which were or had been in the possession of persons interested, not in the insurance only but in the adventure, such as the shipowner, though he had no interest in an insurance on goods; and on the suggestion of the Court that the order for discovery of ship's papers should be revised, the Lord Chancellor appointed a committee which consisted of counsel and solicitors conversant with marine insurance, and of which I was chairman, and we made a report, in consequence of which the order for ship's papers has assumed its present form. (3)

In my view, in order to decide whether the case is one in which the order should be made, regard must be had to the policy of insurance and to the adventure giving rise to the action. Is the policy a marine policy? That is the question. In connection with every marine policy the order should be made. If the adventure has nothing to do with the sea at all,

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(1) [1922] 1 K. B. 563.

(2) [1924] 1 K. B. 79.

(3) The present form will be found in the Annual Practice, 1932 (the White Book, pp. 1659, 1660), and in the Yearly Practice of the Supreme Court, 1932 (the Red Book), vol. 2, p. 2455.

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if, for example, the policy is an in and out policy like one of the insurances included in *Tannenbaum & Co.* v. *Heath* (1), and the policy is not in the form of a policy of marine insurance at all, then no order should be made for ship's papers; but if the policy is in the form of a marine insurance policy involving risk at sea, the order must be made; and the rule equally applies, as was said by Mathew L.J. in *Harding* v. *Bussell* (2): "Where the transit, though partly by land, is covered by a policy . . . . which is substantially a policy of marine insurance." This becomes very marked when it is remembered that of late years every policy of insurance covering goods in transit by sea contains a warehouse to warehouse clause covering at the beginning and at the end of the marine adventure a transit by land. When damage to the goods is discovered while the goods are in a warehouse at the end of the marine adventure, it is extremely important that the order should be made, for there may be a question whether the goods were damaged at sea, and if so whether the ship was seaworthy, or whether the damage occurred on land through some cause unconnected with the sea. In my experience the order is regularly made although the policy on which the action is brought contains a warehouse to warehouse clause. It may seem strange that, except in *Harding* v. *Bussell* (2), this regular practice does not seem to have been noticed, but the explanation may be that among the limited class of persons who are versed in matters of marine insurance, no one ever thought of raising a doubt about it.

Now applying this principle, I look at the policy to see what is its nature. I am sure we have not got all the documents; no doubt there is behind this policy an open cover under which declarations are made by the assured to the underwriter, but the open cover cannot be sued on owing to the Stamp laws, which require that the policy shall specify the adventure, and the open cover cannot do this because it is made before the adventures to be declared are known. Means have been discovered to meet this difficulty, and this is one of them. In this form of policy week by week the

(1) [1908] 1 K. B. 1032. (2) 10 Com. as. C184, 188; [1905] 2 K. B. 83.

adventures that have been declared during the week on the open cover are embodied in a stamped policy. This is done at the end of the week, when the particulars of the adventure are known. Accordingly this policy is a record of a risk covered for the week ending on June 15, 1931. The policy bears on the outside the words "Lloyd's London July 24 1931. Steamers as specified. Voyages as specified. 6028*l.* on interest" (1)—that being the amount that has been declared during the week. In the schedule of risks declared appears a particular number, 141390. Then "Insured, Leon . . . . by the steamship *Lotus.* Voyage from Cairo to Jaffa," and on looking at the policy one finds the warehouse to warehouse clause. The policy itself is in the form of a marine policy which has for the most part been drawn up before the declarations were made. It is plainly a marine policy with land risks before and after the marine risk, which are of the nature of the land risks covered by the warehouse to warehouse clause, itself also included.

In my view such a policy comes clearly within the decision of the Court of Appeal in *Harding* v. *Bussell* (2), and the order for ship's papers should therefore be made, and none the less so because the loss is alleged to have occurred during transport by land before the shipment on board the *Lotus* contemplated by the policy began. MacKinnon J. came to the right conclusion, and the appeal must be dismissed.

GREER L.J. I have come with regret to the conclusion that the authorities oblige me to hold that we cannot interfere with the order of MacKinnon J.

Before dealing with the facts of this case and the law relating to them, I should like to make two general observations. The first is that no more unpleasant duty has to be performed by a judge than that of giving, in accordance with binding authority, a decision which upon the facts before him he considers both unreasonable and unjust. That is the task which I have before me in this particular case.

(1) The forms of policy supplied to the Lords Justices varied from each other in certain immaterial particulars.

(2) 10 Com. Cas. 184, 188; [1905] 2 K. B. 83.

The plaintiff wanted to have some goods sent from Cairo to Jaffa. He went to a firm of insurance agents to have the adventure insured, and, if he had got a policy in the form of the certificate which was given him by the insurance broker, he would have had upon the same document two insurances, one an insurance of a land journey from Cairo to Alexandria and the other an insurance of a sea voyage on board the *Lotus* from Alexandria to Jaffa. Those two adventures are kept separate in the certificate. But the broker did not obtain, and has not yet obtained, a policy in that form, but has obtained a marine policy in the ordinary form, with the warehouse to warehouse clause, covering the sea voyage and the ancillary journey by rail from Cairo to the port. In these circumstances I cannot escape the conclusion that we must regard the policy, which is the only document upon which the action could be brought, as a marine policy, with all the legal incidents of such an instrument.

The other general observation is this, that custom and habit tend to blind the vision. At a time when the criminal law of this country was in a state to disgrace a half-civilized country, judges of high authority and writers of text-books had been brought up to regard it as the "perfection of reason" (1); and I cannot help thinking that those members of the profession, who both at the Bar and on the Bench have been largely engaged in matters of marine insurance, have come to believe that the rules which have hitherto been applied in marine insurance are those which ought to be applied, and that the law as it stands is incapable of improvement. I take a very different view. In my opinion the order for ship's papers was invented at a time when it was necessary in order to do justice to the case of the insurer; it has now become an unfair and unjust weapon in the hands of the insurer. I have known of case after case in the Commercial

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(1) "And the law, that is the perfection of reason, cannot suffer anything that is inconvenient . . . . For reason is the life of the law, nay the common law itselfe is nothing else but reason; which is to be understood of an artificiall perfection of reason, gotten by long study, observation, and experience, and not of every man's naturall reason": Co. Litt., s. 138, folio 97*b*.

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List where defendants, who had no real defence, have been enabled by means of this instrument of oppression to keep plaintiffs out of their insurance money for long periods of time; and I regret that the Court has not felt itself justified in holding a tighter hand upon this practice than it has done. But it has ultimately been decided that if in a case of marine insurance there is a single document which has not been accounted for by the plaintiff, the defendant can hold up the case until the plaintiff searches the world over for that document, which is often just as obtainable by the insurers as it is by the assured. It would be possible under the powers of the Court to confer on the judge hearing the summons for directions greater control over the practice of ordering discovery of ship's papers, so that he might exercise his discretion according as the practice is being used for the necessary purposes of justice or is being abused as a means of oppression in the hands of the insurance company or Lloyd's underwriter. I doubt whether this can be done under the existing Rules of Court, but, if it could be done, I should think the change would be a welcome one to all who desire that justice shall be done and that there shall be a speedy end to litigation.

However, I cannot decide this case on general principles. I must decide it in accordance with former decisions. The claim is made in respect of that part of the adventure which consisted of conveyance by land; and it was contended that to such a claim the rule relating to the affidavit of ship's papers does not apply. What, it is asked, is the use of having ship's papers when the voyage by sea has nothing whatever to do with the matters in dispute in the action? But, of course, the law has often been laid down, and often acted upon, that the order for ship's papers does apply to an action on a policy of marine insurance containing a warehouse to warehouse clause, and it cannot be maintained that ship's papers must be irrelevant to a transit which begins on land and a substantial part of which is continued on sea. Goods may, for example, be carried on a through bill of lading, and there may be a deviation either in that part of the journey which is on land or in that part which is by sea. If it has been held, as I think it has, that where the adventure is substantially a marine adventure the order for ship's papers is applicable, then the question in each case is whether the adventure is, or is not, substantially a marine adventure, and in deciding that question the contract of insurance cannot be left out of account, for it is an indication of the adventure which the parties had in mind.

In this case the parties were contemplating a marine adventure which, though it started on land, was yet substantially a marine adventure within the meaning of s. 2 of the Marine Insurance Act, 1906, which provides that: "A contract of marine insurance may, by its express terms, or by usage of trade, be extended so as to protect the assured against losses on inland waters or on any land risk which may be incidental to any sea voyage." I think those words are wide enough to cover the contract of insurance in this case, and I think the authorities show that, in order to determine whether there should or should not be an affidavit of ship's papers, one must look not at the nature of the claim in the action but at the nature of the contract which is sought to be enforced by the action. In my opinion that view is consistent with all the cases on the subject, and I doubt whether *Village Main Reef Gold Mining Co.* v. *Stearns* (1) is in the least inconsistent with it, notwithstanding that Mathew L.J., in *Harding* v. *Bussell* (2), seemed to think it was. In his judgment (3) Kennedy J. says: "Of course, if the insurance is substantially one of sea carriage, although the subject matter is also covered while on shore, it would still be a marine insurance." In my view *Harding* v. *Bussell* (2) and *Village Main Reef Gold Mining Co.* v. *Stearns* (1) run upon the same lines; the question which had to be decided in each case was whether the contract in question was or was not substantially a contract relating to a marine adventure. In *Harding* v. *Bussell* (4) Mathew L.J. said: "Here the policy sued upon is substantially a marine policy, but we are asked to say that because a small portion of the transit covered by the policy is by land, and because the policy covers the goods from warehouse to warehouse and while there, the whole of the established practice should be altered." I do not regard that as in any way conflicting with the principle on which Kennedy J. acted in the decision to which I have referred.

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(1) 5 Com. Cas. 246.

(2) [1905] 2 K. B. 83; 10 Com. Cas. 184.

(3) 5 Com. Cas. 248.

(4) 10 Com. Cas. 184, 187; [1905] 2 K. B. 83, 85.

Then came the case of *Tannenbaum & Co.* v. *Heath* (1), a decision of Lord Alverstone C.J. and Farwell L.J. which has given me the most trouble. It is difficult to discover from the words of Lord Alverstone what his view was exactly. He appears to be in doubt between two views as to what determines the right to have an affidavit of ship's papers; one that the nature of the claim decides the question, the other that it turns upon the nature of the contract on which the claim is made. Thus the learned Chief Justice says (2): "There"—i.e., in *Harding* v. *Bussell* (3)—"the decision in *Henderson* v. *Underwriting and Agency Association* (4) was questioned, and it was held that, where an insurance was substantially a marine insurance, the fact that part of the transit was by land did not affect the right of the defendant to an affidavit of ship's papers. That case is important, because it shows that for this purpose that which has to be looked at is the substance of the claim in the action." In the next sentence we find these words: "Mathew L.J. at the beginning of his judgment called attention to the fact that the policy in that case was in substance a marine policy, although it did cover a short transit by land, from ship to warehouse;" . . . . This points to the nature or substance of the contract of insurance as being the test. On the next page the learned Chief Justice says (5): "In *Harding* v. *Bussell* (2) discovery of ship's papers was ordered, where the real claim was on a marine insurance"; and lower down: "The result of the cases appears to me to be that the question which has to be considered, in order to determine whether discovery of this kind can be given, is: What is really the nature of the insurance upon which the action is brought? Here it is not disputed that the action is upon a policy of fire insurance on precious stones on land. It is admitted that the claim was not on clause 4 of the policy." That points to the nature of the claim as the test. In truth *Tannenbaum & Co.* v. *Heath* (1) was concerned with a policy of insurance which in substance was one of insurance against losses by fire and by dishonesty of servants occurring on land, and only incidentally covering an event which might happen—namely, that occasionally the goods would be travelling by sea. I do not regard that case in the light in which Mr. Robertson would present it, as showing that the nature of the claim and the fact that it is a claim in respect of a loss on sea or of a loss on land, as the case may be, determine the question whether there should or should not be an affidavit for ship's papers. The true view seems to be that the nature of the contract of insurance determines that question. If the contract of insurance is substantially a contract of marine insurance, an order for an affidavit should be made; and, whatever might have been my view if the policy had been drawn up in accordance with the certificate which was obtained, I feel myself unable to hold that the policy actually delivered and accepted, which was the only one upon which at present an action can be brought, is not substantially a marine policy. For these reasons I think the case is one in which the learned judge might make the order and we cannot interfere with it.

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(1) [1908] 1 K. B. 1032.
(2) Ibid. 1036.
(3) [1905] 2 K. B. 83.
(4) [1891] 1 Q. B. 557.
(5) [1908] 1 K. B. 1037.

Slesser L.J. I agree that this policy must be regarded substantially as a policy of marine insurance; indeed, I doubt if Mr. Robertson contests that point. His argument, as I understand it, is that in each case the claim made upon the particular misadventure determines the question whether there shall be an affidavit of ship's papers. There may be cases where it is doubtful whether the loss took place on land or on sea, where, for example, goods are found to be missing when they have reached the consignee or the final warehouse; but here, he argues, the claim is based wholly and specifically on a loss incurred before the goods were at sea at all; and, taking his stand upon the precise and definite nature of his claim and the original purpose and intention of all discovery of documents, he contends that no further discovery is necessary here than there would be in the case of an insurance of goods in transit by land, and that, therefore, these underwriters are not entitled to that particular privilege which is conferred upon underwriters of a policy of marine insurance.

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(1) [1908] 1 K. B. 1032.

I can find no support for this argument, except a passage in the judgment of Lord Alverstone C.J. in *Tannenbaum & Co.* v. *Heath.* (1) Like Greer L.J. I find my chief difficulty in that case. It is true that the facts supplied ample material from which the Court might have inferred that the policy, taken as a whole, was not one of marine insurance, and that the case therefore fell within the class of which *Schloss* v. *Stevens* (2) is an example rather than that represented by *Harding* v. *Bussell.* (3) But Lord Alverstone C.J. has not been content to found himself merely on the nature of the contract. He discusses also the nature of the claim: "If," he says (4), "the claim had been under that clause"—i.e., clause 4, which did relate to a marine risk—"I do not say that there might not have been an order for discovery of ship's papers. But, when one finds that the only claim in this case is on a fire insurance, that the exceptional privilege given to underwriters of a marine policy has never been extended to other insurances, and that most experienced judges in the Court of Appeal have refused to allow it in the case of an insurance of an inland transit, though they have allowed it where the insurance was substantially a marine insurance, it appears to me clear that the order of the learned judge"—for ship's papers—"cannot

(1) [1908] 1 K. B. 1032.

(2) 10 Com. Cas. 224.

(3) [1905] 2 K. B. 83; 10 Com. Cas. 184.

(4) [1908] 1 K. B. 1037.

stand." If that means, as Mr. Robertson contends, that even assuming the policy to be substantially one of marine insurance, the circumstances in which the loss occurred, whether on sea or on land, have to be considered, then Lord Alverstone's view seems inconsistent with a line of authority in which the question, was the contract one substantially of marine insurance, and not the question, was the loss covered by that part of the policy which did not apply to marine risks, was treated as the material question. But I prefer to think that Lord Alverstone treated the policy in *Tannenbaum & Co.* v. *Heath* (1) as really comprising four separate policies, and when he speaks of "the claim" the learned Chief Justice means that one of the four which covers marine risks to the exclusion of the three which relate to risks on land. If that is the true view, the apparent inconsistency between *Tannenbaum's* case (1) and the other cases vanishes. Farwell L.J. seems to have regarded the instrument in this light. He said (2): "In this case the claim is not upon such a policy"—i.e., a marine policy—"It is immaterial that, in another clause of the same document, which is not sued upon, there is an insurance against marine risks." That case, therefore, does not seem to me to cast any doubt upon *Harding* v. *Bussell* (3), and as the policy in the present case is substantially a marine policy and the loss occurred within the limits of the policy, between warehouse and warehouse, I think the principle of *Harding* v. *Bussell* (3) applies, and the appeal must be dismissed.

With regard to the practice of ordering ship's papers and the conflicting views upon the use and abuse of that practice, I hesitate to express a confident opinion. It does not appear to me to be a juridical question, but rather one of legislation or regulation with which I am not directly concerned. Where, in the course of many years, a practice has been developed which has been acquiesced in by both underwriters and assured, I am naturally disposed to presume that probably the practice is right and not wrong; and if any alteration is to be made, I hope it will be made with care and discretion, and after long consideration.

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(1) [1908] 1 K. B. 1032.

(2) Ibid. 1038.

(3) [1905] 2 K. B. 83; 10 Com. Cas. 184.

Appeal dismissed.

Solicitors for appellants: *Montagu's and Cox & Cardale.*
Solicitors for respondent: *William A. Crump & Son.*

W. H. G.

BETTS *v.* RECEIVER FOR THE METROPOLITAN POLICE DISTRICT AND CARTER PATERSON AND COMPANY, LIMITED.

1932
May 9, 10, 11, 12, 13;
June 6.

Public Authorities Protection—Action against Receiver for Metropolitan Police District—Act done in intended Execution of Public Duty or Authority—Possession taken of Goods alleged to have been stolen—Goods handed over to supposed Owner—Action by true Owner—Limitation of Time—When Time begins to run—Public Authorities Protection Act, 1893 (56 & 57 *Vict. c.* 61), *s.* 1.

In the end of 1924 the Metropolitan Police found at the house of the plaintiff and took into their possession a quantity of goods including certain cloth. The plaintiff was brought before the police court on charges of receiving, and some of the evidence there given tended to show, but did not prove, the identity of the cloth with cloth which had been stolen from a firm of carriers. The plaintiff was committed for trial at the London sessions on indictments charging him with having received certain of the goods other than the cloth knowing them to have been stolen, and on an indictment charging him with a similar offence in respect of the cloth, and in February, 1925, he was convicted on the first-mentioned indictments and sentenced to five years' penal servitude. He was never tried on the indictment relating to the cloth, but it was allowed to remain upon the record. On April 2, 1925, the plaintiff not having as yet made any credible claim to the cloth, the Receiver for the Metropolitan Police District handed it over to the firm of carriers, who claimed it, taking from them a written indemnity. On January 16, 1931, the plaintiff, having less than six months before made an unsuccessful demand for the cloth as his property, brought an action against the Receiver and the firm of carriers claiming damages for detinue and conversion of the cloth. The first-named defendant relied, among other defences, upon the Public Authorities Protection Act, 1893. The jury, having heard the evidence, found that it did not establish the identity of the cloth with that stolen from the carriers, and they returned a verdict for the plaintiff against both defendants:—

Held, that the first defendant in handing over the cloth to the second defendants in April, 1925, had acted in "intended execution" of a "public duty" within the meaning of s .1 of the above-mentioned Act,

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BETTS v. RECEIVER FOR THE METROPOLITAN POLICE DISTRICT AND CARTER PATERSON & Co.

and as the action in respect of the act of conversion so effected had not been commenced within six months after that act, it was not maintainable in respect thereof.

Hartin v. *London County Council* (1929) 141 L. T. 120; and *Bradford Corporation* v. *Myers* [1916] 1 A. C. 242, 262 observations applied.

Held, further, that the plaintiff could not elect to rely only on his claim in detinue, so as to make the time run from his demand and to bring the date of the action within six months after the cause of action.

Wilkinson v. *Verity* (1871) L. R. 6 C. P. 206 distinguished and rule in applied.

Held, therefore, that judgment should be entered for the first defendant against the plaintiff, and for the plaintiff against the second defendants.

ACTION tried by du Parcq J. and a jury.

In the end of 1924, suspicion having fallen upon Mr. Joseph Betts, of Kennington, London, S.E., the present plaintiff, of having received stolen goods, the police searched his house and discovered there a quantity of jewellery and other goods, including fifteen rolls of cloth. On December 12, 1924, they took possession of these articles. The plaintiff was brought before the magistrate at the police court on charges of stealing goods and of receiving goods knowing them to have been stolen. The allegations, among others, were there made against the plaintiff that the fifteen rolls of cloth had been stolen from the warehouse of Messrs. Carter Paterson & Co., Ld., the second of the present defendants, and that they had held the cloth as bailees for its owners, Messrs. Peerless & Sons. Only two witnesses were called before the magistrate to identify the cloth as the property of Messrs. Peerless & Sons. One of these was Mr. Goodyear, supervisor to that firm, who said that the cloth in question was similar to cloth which was going through the hands of that firm between 1915 and 1922. The other witness was Mr. Gould, then claims manager to Messrs. Carter Paterson & Co., Ld., who said that he knew that the cloth was missing, but could not describe it. The plaintiff was committed for trial at London sessions on indictments charging him with stealing and receiving the jewellery and certain goods, and also on an indictment charging him with stealing and receiving the fifteen rolls of cloth, and in all these cases the grand jury at the sessions found true bills. On February 17, 1925, the plaintiff was convicted on the first-mentioned indictments of receiving stolen jewellery and goods knowing them to have been stolen, and was sentenced to five years' penal servitude. No evidence was given in support of the charges in the indictment relating to the fifteen rolls of cloth, and the plaintiff had never been tried upon it; but that indictment had been allowed to remain upon the file. The police thus found themselves in possession of the fifteen rolls of cloth which it had been their duty to produce at the police court and at the sessions.

On April 2, 1925, the plaintiff not as yet having made any credible claim thereto, the police handed over the fifteen rolls of cloth to Messrs. Carter Paterson & Co., Ld., and took from them the following acknowledgment and receipt: "I, Charles Gould of Messrs. Carter Paterson & Co., 61 Goswell Road, London, E.C., hereby do acknowledge the receipt from the Commissioner of Police of the Metropolis of fifteen rolls of cloth which were taken possession of by the police in connexion with the case against one Joseph Betts, and in consideration of the restoration of the said cloth I undertake to indemnify the Commissioner and each and every member of the Metropolitan Police Force from all claims and demands whatsoever that may be made in respect thereof and from all costs and actions that may arise in connexion therewith. Dated this 2nd day of April, 1925. (Signed) Charles Gould."

Less than six months before the date next hereinafter mentioned the plaintiff made an unsuccessful demand upon the defendants for the return of the cloth to him.

On January 16, 1931, the plaintiff brought the present action against the above-named defendants, the Receiver of the Metropolitan Police District and Messrs. Carter Paterson & Co., Ld., claiming damages for detinue, damages for conversion, and the return of the bales of cloth or 450*l.* their value. The plaintiff's statement of claim was as follows: (1.) The defendants have detained and detain from the plaintiff his goods and chattels, that is to say fifteen rolls of cloth. (2.) The plaintiff claims the return of the said goods and chattels or their value . . . . and damages for their

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detention. (3.) The plaintiff has suffered damage by the first-named defendant in or about the month of February, 1925, wrongfully depriving the plaintiff of the fifteen rolls of cloth by taking them out of the plaintiff's possession and retaining them, and by the first-named defendant in or about the month of April, 1925, wrongfully depriving the plaintiff of the said rolls of cloth by handing them over to the second-named defendants. (4.) The plaintiff has suffered damage by the second-named defendants on the said last-mentioned date wrongfully depriving the plaintiff of the said fifteen rolls of cloth by converting them to their own use and by wrongfully depriving the plaintiff of the same. Subsequently, the plaintiff stated in answer to interrogatories that the cloth became his property in consequence of a Mr. Freedman to whom he had advanced money on an IOU for 250*l.* in June, 1918, being unable to repay him that sum and giving instructions directing him to deal with the cloth; and that in fact the plaintiff afterwards disposed of part of the cloth.

The first defendant, the Receiver for the Metropolitan Police District, stated in his defence that he denied that he had detained or converted to his own use any goods of the plaintiff; that the cloth referred to was not the property of the plaintiff, but of the co-defendants, and that it had been stolen from the latter; and that in the alternative he would rely upon the provisions of the Public Authorities Protection Act, 1893. (1)

The second defendants, Carter Paterson & Co., Ld., stated in their defence that they denied that they had detained or converted to their own use any goods of the plaintiff; that the cloth referred to at no material time was the property of the plaintiff, but formed part of a consignment of cloth held by these defendants as bailees for Messrs. Peerless & Sons, and stolen from these defendants' premises between August, 1919, and March, 1920, and for which payment was made by these defendants to that firm.

The action was tried on May 9, 10, 11, 12 and 13, 1932, judgment being given on June 6, 1932.

(1) The material words of the Act (s. 1) are set out below in the judgment.

Geoffrey Howard for the plaintiff.

Tristram Beresford for the first defendant.

W. N. Stable for the second defendants.

The course of the proceedings at the trial, as well as the arguments of counsel, appear from the judgment of the learned judge as set out below. In addition to the authorities referred to below in the judgment the following cases were also cited: *The Danube II.* (1); *Smith* v. *Northleach Rural Council.* (2)

Cur. adv. vult.

June 6. The following considered judgment was read by

DU PARCQ J. In this action Mr. Joseph Betts sues the Receiver for the Metropolitan Police District and Messrs. Carter Paterson & Co., Ld., for damages for detinue and conversion. [His Lordship stated the facts substantially as above set out, and continued as follows:] At the trial the conversion relied on as against the Receiver for the Metropolitan Police District was the handing over of the cloth to the second-named defendants in April, 1925. Both defendants by their defences denied that the goods were the property of the plaintiff and alleged that they had been stolen from the defendants, Carter Paterson & Co., Ld. As it was not disputed at the trial that the cloth had been taken out of the possession of the plaintiff by the police, it was, in my view, clear, and I so directed the jury, that unless the defendants could prove this allegation to the satisfaction of the jury the defendants Carter Paterson & Co., Ld., had no answer to the claim, whatever suspicions might be entertained as to the manner in which the plaintiff had come by the cloth. The Receiver for the Metropolitan Police District further relied (by para. 5 of his defence) on "the provisions of the Public Authorities Protection Act, 1893"—a plea, of course, not open to his co-defendants.

Before counsel addressed the jury it was agreed between them, at my suggestion, that no question of fact which might fall to be determined under the last-mentioned plea should be

(1) [1921] P. 183.

(2) [1902] 1 Ch. 197, 202.

left to the jury, that a verdict should be taken without reference to that plea, that the point should be reserved for argument before me, and that I should be at liberty to find facts or draw inferences of fact so far as might be necessary, in order to deal with it. It was not a part of this arrangement that any further evidence should be called after the jury had given their verdict.

The jury on May 11, 1932, found a verdict for the plaintiff against both defendants, subject to the first defendant's plea of the Public Authorities Protection Act, 1893, and assessed the damages at 150*l.*

On the following day Mr. Beresford, on behalf of the first defendant, began his argument before me. In the course of it he found it desirable to ask for leave to call further evidence directed to showing that the circumstances in which the police had delivered the cloth to the second defendants entitled his client to the protection which he claimed. I thought it proper to allow this evidence to be called, and Mr. Howard, for the plaintiff, did not object, or at any rate made no strong objection, to my hearing it at that stage, upon the understanding that the delay in calling this evidence would be a matter for my consideration in dealing with costs. I now have the satisfaction of knowing that all the available evidence on this part of the case was before the Court.

I have no doubt that the jury were right in finding that the defendants failed to establish the identity of the cloth with that stolen, or alleged to have been stolen, from Carter Paterson & Co., Ld. The only two witnesses who were called before the magistrate to identify the cloth as the property of Peerless & Sons, warehoused with Carter Paterson & Co., Ld., were Mr. Goodyear, supervisor to Peerless & Sons, and Mr. Gould, at that date claims manager to Carter Paterson's. These gentlemen gave evidence at the trial of this action. In cross-examination Mr. Goodyear admitted that he had nothing to do with delivering to Carter Paterson's the cloth warehoused with them by his employers, so that it was obvious that he could not identify it, and that he had been able to say no more in the police court than that the cloth in question was similar to cloth which was "going through the hands of" Peerless & Sons in 1915–1922. Mr. Gould, cross-examined, admitted that he had said in his evidence in the police court: "All I know is the cloth was missing—I can't describe the cloth." No other witness was called at the trial who attempted to identify the cloth. I have no doubt, therefore, that so far at least as sworn evidence went there was no sufficient evidence to justify the police in coming to the conclusion in April, 1925, that Carter Paterson's were entitled to have the cloth delivered to them. This consideration, while it does not affect the liability of the second defendants for conversion, may have a bearing upon the plea based upon the Public Authorities Protection Act, 1893. The material words of s. 1 of that Act are as follows: "Where . . . . any action . . . . is commenced . . . . against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, ... the action . . . . shall not lie . . . . unless it is commenced within six months next after the act, neglect, or default complained of."

It was not, and could not be, suggested that the police had acted in pursuance or execution of any Act of Parliament or of any public duty or authority, but reliance was placed on the words "intended execution." I understood Mr. Beresford eventually to admit that the goods were not dealt with as they were in intended execution of any Act of Parliament, although for a time it was sought to suggest that the police were acting in intended execution of s. 1 of the Police (Property) Act, 1897. This section provides for an application by the police to a court of summary jurisdiction where property has come into their possession in connection with any criminal charge, so that an order may be made for the delivery of the property to the person appearing to the Court to be the owner thereof. The police, far from acting in intended execution of this section, chose not to act upon its provisions. Ultimately it was agreed that the only question left was whether the police acted in "intended execution" of a "public duty."

Mr. Howard argued with great force that the police were under no duty to decide between the conflicting claims of the plaintiff and Carter Paterson's, that the provisions of the Police (Property) Act, 1897, relieved them of any such duty, and that apart from that Act they might have sought relief by way of interpleader. If the true view of the facts were that the police wrongly supposed themselves to be under a duty to make a decision between rival claimants, I should be disposed to agree with Mr. Howard that the Public Authorities Protection Act, 1893, afforded no protection to the police. In my view, it is at least doubtful whether the Act protects a public officer who, while rightly apprehending the facts, takes a mistaken view as to his legal obligations, and executes or intends to execute some function which he has no duty to execute. On the other hand, if a public officer makes an honest mistake of fact and does that which it would be his duty to do if his view of the facts were correct, he is, in my judgment, acting in intended execution of a duty within the meaning of the section.

In the present case the decision to hand over the cloth to Carter Paterson's was taken by Mr. Norman Kendal, who was in 1925 Deputy Assistant Commissioner of the Metropolitan Police. Mr. Kendal stated his view of the duty which he conceived himself to have executed as follows: "As soon as we are satisfied that we know the owner and there is no real dispute it is our business to give up (the goods) as soon as we can, either taking an indemnity or not, according to the circumstances." "Where there is any doubt as to the ownership in our minds," he said later, "we should write to both claimants, and refer to Bow Street under the Police (Property) Act, 1897. That course is adopted where we believe that there is a real dispute." I am satisfied that in the present case Mr. Kendal and those subordinate officials who reported to him not only had no belief in the validity of the plaintiff's claim to the goods, but did not believe in 1925 that he intended to make a claim to the goods. It is true that when questioned about the cloth in December, 1924, he appears to have said that he bought it six years before, that it was bankruptcy stock, and all right, and further that he gave the name of a man named Freedman, whose address he did not know, to the police as that of his vendor. Any member of the police force, however, might be forgiven for thinking such a story both unoriginal and unconvincing. When the detective asked the plaintiff if he could supply proof of the alleged transaction, the plaintiff said: "I can't just now but you don't want to waste your time about that stuff. I can prove when I bought it if you think it necessary. I know that I've lost money on the deal by keeping it all this time." Except that in a letter written from prison on March 30, 1925, the plaintiff, when asking that certain articles might be handed to his daughter, referred generally to "further claims" which he might make, there was nothing to suggest to the police that they were likely to hear any more from the plaintiff about the cloth which, in their view, formed a comparatively insignificant part of the mass of stolen goods which had been discovered on his premises. In these circumstances it was tempting to believe that it was indeed the cloth which Carter Paterson's had missed in 1919 and 1920, especially as the witnesses who were called to identify it seem to have been much more positive outside the witness box than in it. In a report dated March 28, 1925, the inspector who was in charge of the case reported to the chief inspector that Peerless & Sons had "positively identified it" (the cloth) "as part of the cloth stolen from Carter Paterson's premises." Mr. Kendal, in these circumstances, formed the bona fide view that there was no real dispute as to the ownership of the cloth, and that Carter Paterson's were entitled to have it.

The fact that the police took an indemnity from Carter Paterson's was relied upon as indicating that they felt some uncertainty as to its ownership, and it has caused me to consider very seriously whether I ought to find that Mr. Kendal was wrong in his recollection when he told me that he had no doubt in 1925 that the cloth found in the plaintiff's possession had been stolen from Carter Paterson's. I am satisfied, however, that the indemnity was taken as a measure of precaution and almost as a matter of routine, partly to guard against the possibility of an unsuccessful action being brought by an impecunious claimant from whom no costs would be recovered.

On his view of the facts, I think that Mr. Kendal was right in considering that the police were under a duty to hand over the cloth as soon as possible to Carter Paterson's. It is true that an application might have been made under the Police (Property) Act, 1897, and I think that an application should always be made under that Act when there is any ground whatever for thinking that there are conflicting claims. I must deal with this case, however, on the footing that in the view of the police Carter Paterson's had a good claim and no one else was making a real claim, and on this view of the facts I agree with Mr. Kendal that their duty was to deliver the cloth at once to its true owner. This duty seems to me to satisfy the test laid down by Avory J. in *Hartin* v. *London County Council* (1), where that learned judge says that the word " duty " in the Act means a duty which can be legally enforced.

The question remains whether this duty was a " public duty." I have considered all the authorities to which I was referred by counsel on this point. I am not sure that any of them exactly covers the present case, but they have guided me to the conclusion that when an officer of the police force comes under a legal obligation to hand over to their true owner goods of which he has become possessed in the course of performing his duties to the public, that obligation is " a public duty." In his speech in the House of Lords in *Bradford Corporation* v. *Myers* (2) Lord Shaw of Dunfermline speaks of the limitation as applying to " something founded truly on their " (that is the defendants) " statutory powers or their public position." In the present case no question of statutory powers remains, but, in my view, the duty in intended execution of which the police acted was " founded . . . . on their public position." The burden of performing it fell on the police only because they were public servants, and it formed part of their larger duty to serve the public by exercising their functions according to law. It was accordingly, in my view, "a public duty" within the protection of the Act.

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(1) 141 L. T. 120.

(2) [1916] 1 A. C. 242, 262.

I must say something as to the position of the Receiver for the Metropolitan Police District, because it was suggested by Mr. Howard, if I understood him aright, that this official had no duty to deal with these goods at all. That may perhaps be true, but if so, it is, I think, equally true to say that the Receiver never dealt with, and never converted or detained the goods. The plaintiff chose to sue the Receiver, alleging that he had converted the cloth, and it was not disputed—indeed it was admitted—at the hearing that the Receiver was properly sued as the responsible official. I must not be taken to decide that it was proper to sue him, but it seems to me plain that if he were to be held liable it could only be on the footing that he was responsible for the doing of those acts which were done, as I have found, in intended execution of a public duty. In other words, either no action lay against him at all, or he is entitled to the protection of the Public Authorities Protection Act, 1893.

Mr. Howard took a further point. He argued that, on the principle of *Wilkinson* v. *Verity* (1), the plaintiff here was entitled to elect to rely on his claim in detinue, so that time ran only from the date of his demand, which was within the period of limitation. In my opinion, however, the present case is within the general rule stated by Willes J. in *Wilkinson* v. *Verity*. (1) "It is a general rule that, where there has once been a complete cause of action arising out of contract or tort, the statute begins to run, and that subsequent circumstances which would but for the prior wrongful act or default have constituted a cause of action are disregarded." This rule had already been laid down and acted upon forty-five years previously in the case of *Granger* v. *George*. (2) The facts in *Wilkinson* v. *Verity* (1) were held to take that case out of the general rule, to which exceptions may arise where there are "circumstances to show a trust for the owner or to found an option to sue either for the wrong or for the breach of the original terms " of a contract of bailment (see per Willes J.). No such circumstances exist here.

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(1) (1871) L. R. 6 C. P. 206, 209, 210.

(2) (1826) 5 B. & C. 149.

It follows from the verdict of the jury and my decision that there must be judgment for the plaintiff against Carter Paterson & Co., Ld., for 150*l.*, with costs, and for the Receiver for the Metropolitan Police District against the plaintiff, with costs to be taxed (as provided by the Act) as between solicitor and client, subject to this, that, for reasons which I have sufficiently indicated, the Receiver is to have no costs of the proceedings on the last day of the hearing.

Judgment accordingly.

Solicitor for plaintiff : *F. W. Perkins.*
Solicitors for first defendant : *Wontner & Sons.*
Solicitors for second defendants : *Theodore Goddard & Co.*

J. R.

C. A.
1932
June 24, 27, 28.

FARR *v.* BUTTERS BROTHERS AND COMPANY.

[1930. F. 1958.]

Negligence—Crane Sold in Parts by Manufacturers to Builders—Parts Assembled by Builders' Employee—Employee working Crane with Knowledge of Defect—Employee Killed owing to Defect—Liability of Manufacturers.

Crane manufacturers sold a crane in parts to a firm of builders, the arrangement being that the parts were to be assembled by the builders' men. The builders had in their employment an experienced crane erector, who in assembling the parts found that certain cog-wheels worked stiffly, did not fit accurately, and required to be remedied ; he accordingly marked in chalk the places where there was inaccurate fitting, saying at the same time that he would have to report the matter to his employers. Before the defects so discovered had been remedied the erector began working the crane, and while he was so engaged a part of it fell and killed him, the fall being due to the defects above mentioned. In an action by his widow under the Fatal Accidents Act, 1846, against the manufacturers of the crane :—

Held, that the defects being discoverable on reasonable inspection, and, having in fact been discovered by the deceased man, the manufacturers owed him no duty and were not liable for the accident.

Caledonian Ry. Co. v. *Mulholland* [1898] A. C. 216 applied.

M'Alister (or *Donoghue*) v. *Stevenson* [1932] A. C. 562 ; 48 Times L. R. 494 distinguished.

APPEAL from a decision of McCardie J.

The plaintiff sued the defendants under the Fatal Accidents Act, 1846, claiming damages in respect of the death of her husband in the following circumstances: The deceased was an experienced crane erector in the service of builders to whom the defendants, who were manufacturers of cranes, sold a crane in parts. The deceased's duty was to assemble the parts and put the crane in a condition for use. In assembling the parts the deceased found that certain cog-wheels worked with unusual stiffness, and did not fit properly. He marked in chalk those places where the wheels fitted inaccurately, and said that he would have to report the matter to his principals. He, however, began working the crane before the defects had been remedied, and while it was working and he was standing under the jib it fell and killed him.

By her statement of claim the plaintiff alleged that "the said crane was a new one and had been made and supplied by the defendants who were responsible for its safe and efficient working, and the said accident was the result of the negligence of the defendants, their servants or agents." In her particulars she alleged: (*a*) "the said crane was defective in construction and assembled without proper care in that the gear wheels had not been trimmed to mesh properly with the result that they jammed and broke, so letting the jib fall"; and (*b*) "failure to test the crane before delivery and/or after erection."

The case was set down for trial with a jury, but, after evidence had been given for the plaintiff, McCardie J. held that there was no case to go to the jury. There was, in his opinion, evidence which would enable a jury to say that the crane, when delivered, was defective in that the meshing of the cog-wheels was not adequate, but there was no evidence that the defendants knew that the crane was dangerous or defective, nor could it be said that there was any concealed defect in the crane. Further, if there was negligence on the part of the defendants with regard to the meshing, a fortiori there was negligence on the part of the deceased man, who knew the exact state of affairs, who allowed the crane to

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be worked with that knowledge, and who was the first to be responsible for its use when the accident occurred.

The plaintiff appealed.

Somervell K.C. and *Edgar Dale* for the appellant. This action, which is based on negligence apart from contract, is brought by its facts within the principle of the decision of the House of Lords in *M'Alister* v. *Stevenson* (1), which was given after McCardie J.'s decision in the present case. A duty was owed by the defendants to those in the purchasers' employment who were to use the crane. In *M'Alister's* case (1), which was brought in respect of injury suffered by the plaintiff through drinking ginger-beer sent out by the manufacturers in a bottle into which a snail had crept, emphasis was no doubt laid on the fact that the bottle was intended to reach the ultimate consumer—in that case the plaintiff—exactly in the state in which it was sent out by the manufacturers and with no possibility of intermediate examination, inasmuch as the bottle was opaque. In the present case the crane was sent out by the respondents as being in a fit state to be assembled out of the identical parts they supplied and without the idea that any intermediate examination was necessary. If there had been a latent defect the appellant would clearly have had a good cause of action. True, the deceased man saw that the cog-wheels did not fit accurately, but there may be a visible defect which constitutes a latent danger. As was held in *MacPherson* v. *Buick Motor Co.* (2): "If the nature of a finished product placed on the market by a manufacturer to be used without inspection by his customers is such that it is reasonably certain to place life and limb in peril if the product is negligently made, it is then a thing of danger." That is good law, and in line with the English cases such as *George* v. *Skivington* (3); *Dominion Natural Gas Co.* v. *Collins & Perkins* (4); *Chapman* v. *Saddler*. (5) Although in this case the deceased man saw that the meshing of the cog-wheels was irregular, there is strong evidence on the facts that he was unaware that such a defect would cause anything but a stiffness in working; it is inconceivable that he would have gone on working the crane if he knew that danger was involved in doing so. Stiffness in working is quite common in a new crane. McCardie J. relied in support of his view on *Earl* v. *Lubbock* (1), which followed *Winterbottom* v. *Wright* (2), but it is submitted that the principle there laid down cannot be accepted as good law since the decision in *M'Alister's* case. (3) Further, if there was any question of contributory negligence, that ought to have been left to the jury.

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(1) [1932] A. C. 562; 48 Times L. R. 494.

(2) (1916) 217 N. Y. 382.

(3) (1869) L. R. 5 Ex. 1.

(4) [1909] A. C. 640.

(5) [1929] A. C. 584.

[*Thomas* v. *Winchester* (4); *Caledonian Ry. Co.* v. *Mulholland* (5); and *Bates* v. *Batey & Co.* (6) were also referred to.]

Hilbery K.C. and *Vos*, for the respondents, were not called upon.

SCRUTTON L.J. This case is of considerable interest, because, between the date of the judgment given by McCardie J. and the hearing of this appeal, the House of Lords has delivered a very important judgment in *M'Alister* v. *Stevenson*. (3) I do not propose to deliver a complete judgment on the effect of that decision; all I shall deal with are the facts of the present case in order to see how far they are affected by the principles laid down by the House of Lords.

The action out of which the present appeal arises was brought under the Fatal Accidents Act, 1846, by the widow of a foreman erector of cranes who was killed by the falling of the jib of a crane which he had been responsible for erecting. The action is brought against the manufacturers of the crane, who sold it in parts to a firm of builders who were themselves to assemble the parts, and who in fact did this under the supervision of the man who was killed. It seems to be clear that two of the cog-wheels used in the working

(1) [1905] 1 K. B. 253.
(2) (1842) 10 M. & W. 109.
(3) [1932] A. C. 562; 48 Times L. R. 494.
(4) (1852) 6 N. Y. 397.
(5) [1898] A. C. 216.
(6) [1913] 3 K. B. 351.

of the crane did not fit accurately. The extent of the inaccuracy might be a question of doubt; it might be no more than was to be expected in a new crane, and in erecting it the inaccuracy would be discovered and put right; on the other hand, the inaccuracy might be, and I will assume that in this case it was, more than a slight difference in measurement which might be expected and put right when the crane was erected from the parts. The action, not being between the seller of the crane and the purchaser of the parts to be assembled, the question is, is there any liability on the part of the manufacturers to the employee of the purchaser? Was there a liability in tort?

The judge did not allow the case to go to the jury, and the evidence on which he came to his conclusion included the testimony of three men who were working with the deceased man and were under his control. All three agreed that the deceased, while the crane was being assembled, ascertained that the cog-wheels did not fit properly, that their inaccuracy was such that the crane was working with unusual stiffness, that he examined the cog-wheels and found where the inaccuracy was that required to be corrected, that he marked those inaccuracies with chalk in order that they might be corrected, and that he said that he would have to report the matter to his principals. In spite of this discovery, marking, and statement of his intention to report, he began working the crane before the inaccuracies had been corrected. In working it in that condition he was, while standing under the jib, killed by its fall, the fall being due to the effect of the inaccuracies which he had discovered. That evidence leads to one conclusion only—namely, that after the manufacturers had supplied the parts of the crane to their purchasers there was an opportunity for examination in that the purchasers were going to assemble the parts, that that opportunity was used by their skilled erector, who examined the wheels and found their condition and did not rectify it. We have repeatedly held that when a plaintiff gives evidence which is only consistent with the accident being caused by his own negligence the judge ought to withdraw the case from the jury instead of leaving it to them to say whether the admitted facts constituted negligence. McCardie J. took this view, saying: "I repeat in this case that, so far from asking the defendants to erect this machine, Mr. Smith left it to his own men, not to inexperienced men, because again and again in the course of the testimony in this case it was pointed out that Farr was a man of exceptional experience, with full responsibility, and trustworthy in every way. Where then was the concealed defect? I can only say this, that if there had been a case in my view fit to leave to the jury, if there was negligence on the part of the defendants with regard to this meshing, then, a fortiori, there was negligence on the part of Farr, who knew the exact state of affairs, who allowed the crane to be worked with a knowledge of that state of affairs, and who was the first to be responsible for the use of the crane which led to the accident. I cannot see on the authorities, therefore, that there is any cause of action for this alleged negligence by the defendants, if there was negligence." That is exactly the view I have endeavoured to state.

The judge dealt with another matter. There has been a difference of opinion between the judges of the United States and the judges of this country as to the circumstances in which a vendor may in respect of defects in goods sold by him be liable to persons with whom he had no contract· American authority on this subject begins with *Thomas* v. *Winchester*. (1) There the vendor was asked for dandelion extract, but carelessly sold extract of belladonna instead, with the result that a person with whom he had no contract used the extract and suffered injury. The Court held that the manufacturer was liable in tort to the ultimate consumer. Lord Atkin, in his judgment in *M'Alister's* case (2), referred to the latest case in America on this subject, the decision of Cardozo J. in *MacPherson* v. *Buick Motor Co.* (3), where the same principle was applied in the case of the purchaser of a motor-car from a dealer to whom it had been sold by the manufacturer. The purchaser from the dealer was injured by a defective wheel, which could be discovered by reasonable inspection, and he sued, not the dealer from whom he had bought the car, but the manufacturer who had made it. I notice that in his very careful judgment Cardozo J. points out that the manufacturer could by reasonable inspection have discovered the defect. There does not seem to have been any discussion of the question whether the purchaser could have discovered the defect. The cases cited in that judgment in some of their results differ very widely from the judgment of the House of Lords in *M'Alister's* case. (1) McCardie J., in the present case, said that if he had been left to himself, unfettered by authority, which he regards with considerable contempt, he would have come to the same conclusion as Lord Esher (then Brett M.R.) came to in *Heaven* v. *Pender*. (2) That remark, I think, must have been due to momentary forgetfulness, because Lord Esher, in *Le Lievre* v. *Gould* (3), restricted the proposition he stated in *Heaven* v. *Pender*. (2) If he had been left to himself McCardie J. would have agreed with the American authorities. I agree with what Lord Atkin said in *M'Alister's* case (1): "I venture to say that in the branch of the law which deals with civil wrongs, dependent in England, at any rate, entirely upon the application by judges of general principles also formulated by judges, it is of particular importance to guard against the danger of stating propositions of law in wider terms than is necessary, lest essential factors be omitted in the wider survey and the inherent adaptability of English law be unduly restricted. For this reason it is very necessary, in considering reported cases in the law of torts, that the actual decision alone should carry authority, proper weight, of course, being given to the dicta of the judges." English judges have been slow in stating principles going far beyond the facts they are considering. They find themselves in a difficulty if they state too wide propositions and find that they do not suit the actual facts.

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(1) 6 N. Y. 397.

(2) [1932] A. C. 562; 48 Times L. R. 494.

(3) 217 N. Y. 382.

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(1) [1932] A.C. 562; 48 Times L.R. 494.
(2) (1883) 11 Q. B. D. 503.
(3) (1893) 1 Q. B. 491.

In approaching the decision of the House of Lords in *M'Alister's* case (1) we have to see exactly what they have stated, and how they have limited their propositions. Lord Atkin begins by stating this proposition: "The rule that you are to love your neighbour becomes in law, you must not injure your neighbour, and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law, is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question." That is very like the way in which Lord Esher restated the proposition in *Le Lievre* v. *Gould*. (2) There a surveyor of a building contract gave certificates that certain stages of the work had been reached. These certificates were negligently given and were inaccurate. On the faith of them mortgagees had advanced money. Later, finding out the inaccuracies, the mortgagees sued the surveyor for negligently giving the certificates. His answer was that he owed no duty to the mortgagees, and it was held by the Court of Appeal, including Lord Esher, that the defendant was right in that contention. Lord Esher restated his his proposition thus (3): "If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property." With the greatest respect to Lord Esher, that is not accurate. A man may be near to another, he may, for example, have a plot adjoining that on which the other has just erected a house, and the second man may build a house which shuts out the view of the first house and depreciates its value. He owes no legal duty not to do this, but he has caused injury to the man near to him, and, yet, he is not within the language used

(1) [1932] A. C. 562; 48 Times L. R. 494. (2) [1893] 1 Q. B. 491.
(3) [1893] 1 Q. B. 497.

by Lord Esher. Again, a shopkeeper finds a shop has been erected next door to him, the second shopkeeper selling the same class of goods at half the price charged by the other. The second man intends to injure the first, but the first has no cause of action, although the two are near to each other. Again, a person may on his own land interfere with underground water with the intention of injuring his neighbour but no cause of action arises: *Bradford Corporation* v. *Pickles.* (1) It is quite clear that the statement, both of Lord Esher and Lord Atkin, needs qualification, the nature of which was discussed by the House of Lords in *Sorrell* v. *Smith.* (2)

Apart from the general proposition stated by Lord Atkin, which is wider than is necessary, the House of Lords, in my view, has very definitely limited in the case before it the point at which liability exists on the part of the manufacturer to a person who ultimately uses the goods which the manufacturer has sold. In the particular case the facts were these: A manufacturer of ginger-beer sold his ginger-beer in opaque bottles. Into one of the bottles a snail had crept. The manufacturer filled the bottle without noticing the presence of the snail and corked it up. The bottle being opaque no one could see the snail, even if the bottle were held up. Ultimately the bottle with the snail in it passed to a consumer who drank the contents, and, having been made ill, sued the manufacturer. The Court of Session held that there was no privity between the manufacturer and the consumer. The House of Lords reversed that decision, basing its judgment on the fact that the consumer was in such a proximate relation to the manufacturer that legal relations resulted; and the finding of proximate relationship was rested on the fact that the manufacturer sent out his goods in such a container that no one could discover the defect until the consumer had begun to consume the ginger-beer, for the snail did not necessarily come out when the ginger-beer was poured out. There was thus no opportunity of independent examination

(1) [1895] A. C. 587.

(2) [1925] A. C. 700.

between the manufacturer and the consumer. That proximate relationship, according to the three law lords who constituted the majority, created the liability of the manufacturer. Lord Thankerton said: "The present case is that of a manufacturer and a consumer, with whom he has no contractual relation, of an article which the manufacturer did not know to be dangerous, and, unless the consumer can establish a special relationship with the manufacturer, it is clear, in my opinion, that neither the law of Scotland nor the law of England will hold that the manufacturer has any duty towards the consumer to exercise diligence. In such a case the remedy of the consumer, if any, will lie against the intervening party from whom he has procured the article. I am aware that the American Courts, in the decisions referred to by my noble and learned friend, Lord Macmillan, have taken a view more favourable to the consumer." There, obviously, the liability is rested upon the fact that the manufacturer sends out the ginger-beer in such a condition that it cannot be inspected until it is consumed. The impossibility of intermediate examination makes the relation so proximate that there is a liability. Lord Macmillan puts it in this way: "It may be a good general rule to regard responsibility as ceasing when control ceases. So also where as between the manufacturer and the user there is interposed a party who has the means and opportunity of examining the manufacturer's product before he reissues it to the actual user. But where, as in the present case, the article of consumption is so prepared as to be intended to reach the consumer in the condition in which it leaves the manufacturer and the manufacturer takes steps to ensure this by sealing or otherwise closing the container, so that the contents cannot be tampered with, I regard his control as remaining effective until the article reaches the consumer and the container is opened by him. The intervention of any exterior agency is intended to be excluded, and was in fact in the present case excluded." That is substantially the same ground. Lord Atkin concludes his judgment in these words: "If your Lordships accept the view that the appellant's pleading discloses a relevant cause of action, you will be affirming the proposition that by Scots and English law alike a manufacturer of products which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him, with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products is likely to result in injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care." There again the liability is rested upon no reasonable possibility of examination between the manufacturer and consumer. Among other authorities cited Lord Atkin referred to the decision in *Caledonian Ry. Co.* v. *Mulholland* (1), which was binding upon him. There the owners of a wagon hired it out to carry goods knowing that it would leave their railway and pass on to the line of another railway where it would be discharged by workmen of the second railway company or of a customer of that railway. The House of Lords held that there was no liability in those circumstances by the owners of the wagon to the workman who was injured by using it. Lord Atkin distinguished that case by saying that there was ample opportunity of inspection by the second railway; the relations were not proximate. Throughout his judgment, in passage after passage, he makes the liability turn upon the question of proximate relationship, and rests the proximate relationship on the fact that there could be no intervention between the manufacturer and the consumer, because the way in which the ginger-beer was put up prevented examination, so that there was no intermediate person who could or would examine. If that is the line on which the case proceeded, how does it apply to the present case? The manufacturers of the crane sent out the crane in parts; they were not to assemble the parts. If there were defects in the parts they might be of the class that would be discovered by whoever assembled the parts; the purchasers, through the deceased man, discovered the defects in assembling the parts and saw that they required to be remedied, but nevertheless the deceased took upon himself the responsibility of working the crane before the defects were remedied. Those facts bring the case clearly within the principle of *Caledonian Ry. Co.* v. *Mulholland* (1), and, equally clearly, do not bring it within the decision of *M'Alister's* case. (2) Here there was ample opportunity for intermediate examination before the deceased man met with his accident. Counsel for the appellant said that any question of contributory negligence ought to have been left to the jury. It appears to me that the difficulty arises earlier than that on the decision of the House of Lords in *Caledonian Ry. Co.* v. *Mulholland* (1) and by exclusion in *M'Alister's* case. (2) In this case McCardie J. was right in deciding as he did, and in those circumstances the appeal must be dismissed in spite of the new view involved in the recent decision of the House of Lords.

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(1) [1898] A. C. 216.

LAWRENCE L.J. I agree, and have little to add. In the special circumstances of this case I am of opinion that it is not governed by the decision in *M'Alister's* case. (2) From the judgments of the majority of the House in that case it appears quite clearly that the principle there laid down was not intended to apply to a case like the present where the article (a crane) was supplied by the manufacturers in parts to be assembled by the purchasers before use. The defect in certain of the parts was patent and discoverable, and was in fact discovered by the deceased before he put the crane in operation. Mr. Somervell contended that although the defect was visible it contained a latent danger, but the fact that the cog-wheels did not fit must have brought home to the deceased (who was experienced in erecting and using cranes) that there was something wrong with the crane, yet he took his chance of operating it without remedying the defect or testing the crane to see whether it would work before putting it into operation. In the circumstances there is no need to consider the effect of the deceased having deliberately placed himself under the jib while it was being lowered for the first time after the parts had been assembled. I agree that the appeal fails.

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(1) [1898] A. C. 216.

(2) [1932] A. C. 562; 48 Times L. R. 494.

GREER L.J. I have come to the same conclusion. By her statement of claim the plaintiff set out to establish that her husband had been killed by reason of a breach of duty by the defendants, the breach of duty alleged in para. 3 being that the crane was supplied by the defendants, who were responsible for its safe and efficient working, and the accident was the result of the negligence of the defendants, their servants or agents, in that (*a*) "the said crane was defective in construction and assembled without proper care in that the gear wheels had not been trimmed to mesh properly with the result that they jammed and broke, so letting the jib fall"; and (*b*) the defendants failed to test the crane before it was delivered or assembled. That, of course, means failure to discover by testing that the defect mentioned had in fact existed when the crane was delivered. I agree that the plaintiff's witnesses gave evidence showing that the cog-wheels had not been trimmed to mesh properly, and that if the wheels had been trimmed to mesh properly when the crane was delivered to the purchasers this accident would not have happened. The question is whether that in law would justify a finding for the plaintiff. It is common knowledge among lawyers that mere negligence in itself is not a cause of action. To give a cause of action there must be negligence which amounts to a breach of duty towards the person claiming. There are many cases where there has been clear negligence, in the absence of which damage would not have happened, and yet there is no liability under English law. A person may carelessly leave his keys about whereby another is able to steal a valuable piece of property and to sell it to someone. Unless the sale was in market overt the purchaser gets no property in the article, notwithstanding that it was very careless of the owner to leave his keys about, thus enabling the theft to be committed. Take another example: that of a negligent misrepresentation of fact. Even the person directly affected by that may not be entitled to a remedy, unless it is shown that the law has established a duty towards the person who has been injured. The law laid down in *M'Alister's* case (1) is supposed to have established a rule which is sufficient to justify the plaintiff's claim in the present case. Upon the facts proved in that case the decision of the majority of the House must be regarded as a reasonable interpretation of the law, but it was a very different case from that with which we are concerned, although I agree that it may carry a decision in favour of a workman where the manufacturer has put upon the market, with the knowledge that it is going to be used by a workman, a machine defective in construction in a way that no reasonable examination can be expected to discover. I have very little doubt that the decision of the House of Lords may be extended to such a case. In the present case the particular defect complained of was not only capable of discovery by reasonable inspection, but was in fact discovered at the hands of the unfortunate deceased man. As I read the judgment of the House of Lords, the fact that in that case the defect was not discoverable by such a reasonable examination as ought to be anticipated distinguishes the case from this one. Here the chain is broken between the manufacturer and the person using the article sold, and it is impossible to say in law that the manufacturer has committed a breach of any duty which he owed to the user of the article. In Lord Atkin's speech I find that in dealing with the case of *Heaven* v. *Pender* (2) he said this: "I draw particular attention to the fact that Lord Esher emphasises the necessity of goods having to be used immediately and used at once before a reasonable opportunity of inspection." Again, Lord Atkin refers to the relationship which may be brought about where inspection by the person using the article might reasonably be interposed. Further, he says: "If your Lordships accept the view that the appellant's pleading discloses a relevant cause of action, you will be affirming

(1) [1932] A. C. 562; 48 Times L. R. 494.

(2) 11 Q. B. D. 503.

the proposition that by Scots and English law alike a manufacturer of products which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him, with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products is likely to result in injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care." That is the principle on which he based his judgment. I understand him to mean that if the manufacturer had left a reasonable possibility of examination, either through an intermediate person or by its use, there would be no liability, because there would be no duty. In this case another question might have to be determined, whether or not, assuming a duty on the part of the manufacturers, the accident to the deceased was due to his own negligence. It may well be that on the facts the negligence was his negligence, because it looks as if any experienced user of the crane ought to have known that in the condition in which it was to his knowledge there was considerable risk of an accident. I prefer not to base my decision upon that; I base it upon the point that there was no evidence that the accident was caused through any breach of duty towards the deceased by the manufacturers.

Appeal dismissed.

Solicitor for appellant: *W. H. Thompson.*
Solicitors for respondents: *William Charles Crocker.*

J. S. H.

In re BOWMAN.

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April 5, 6.

SOUTH SHIELDS (THAMES STREET) CLEARANCE ORDER, 1931.

Housing—Clearance Order—Person aggrieved—Application to High Court—Grounds of Application—Mistake in Date for Vacation of Property—Absence of Note indicating Right of Appeal—Housing Act, 1930 (21 *&* 22 *Geo.* 5, *c.* 39), *ss.* 2, 11, 61 ; *First Schedule—Housing Acts* (*Form of Orders and Notices*) *Regulations*, 1930, *Reg.* 2 ; *Form* 13.

A clearance order made by a local authority under the Housing Act, 1930, purported to require that certain of the buildings to which it related should be vacated in a less number of days from the date on which it would become operative than the period of twenty-eight days from that date as required by the Act. The Minister of Health confirmed the order with the modification that the less number of days was altered to twenty-eight days. The order did not include a "starred" note to the form of clearance order prescribed by the Provisional Regulations, 1930, made under the Act setting forth the substance of s. 11 of the Act. On an application to the High Court under sub-s. 3 of that section by the owner of these buildings as a person aggrieved by the order to question its validity in regard to them :—

Held, that the mistake as to the number of days in the order as originally made did not render it an order which was not within the powers of the Act, or prevent it from applying to these buildings ; that the order having been confirmed by the Minister with the above mentioned modification, it could not be said that the requirement of the Act as to the number of days was not complied with by the order ; and, therefore, that that mistake in the order as originally made was not a ground on which the High Court should quash the order in so far as it affected these buildings.

Minister of Health v. *The King* (*on the Prosecution of Yaffe*) [1931] A. C. 494, 504. Observations applied.

Held, further, that the omission of the starred note did not render the order an order which was not within the powers of the Act ; that, assuming that it was a requirement of the Act that that note should be included in the order, there was no evidence in the case before the Court to show that the interests of the applicant had been substantially prejudiced by that requirement not having been complied with ; and, therefore, that the omission of the note was not a ground on which the High Court ought to quash the order.

Semble, that it was not a requirement of the Act that the starred note should be included in the order.

Rayner v. *Stepney Corporation* [1911] 2 Ch. 312 held inapplicable.

The High Court will entertain an application under the Housing Act, 1930, s. 11, sub-s. 3, by a person aggrieved by a clearance order, who desires to question its validity only on the grounds mentioned in that sub-section or either of them—namely, that the order is not within the powers of the Act, or that any requirement of the Act has not been complied with, or possibly on the further ground that there is no evidence to support the order; and not on the ground that the evidence is insufficient to support the order.

APPLICATION under s. 11 of the Housing Act, 1930.

On January 7, 1931, the South Shields Corporation, purporting to proceed under s. 1 of the Housing Act, 1930 (1), passed a resolution declaring the Thames Street area of their district to be a clearance area. On March 9, 1931, the Corporation passed a resolution under that section to secure the clearance of the area.

On April 17, 1931, the Corporation in pursuance of their powers under s. 2 of the Act made an order that each of the buildings specified in the schedule thereto should be demolished, being the buildings coloured pink on a map therein referred to, and that for the purposes of demolition each of the buildings should be vacated on or before the expiration of the period specified in the sixth column of the said schedule opposite to the number and description of the building. The period specified in the sixth column of that schedule opposite to the number and description of each of seventeen of the buildings was a period of seven days from the date when the order became operative, and it was thus less than the period of twenty-eight days required by cl. 1 of the First Schedule to the Act. (1) The order of the Corporation, so far as its body and schedule were concerned, was in all respects in accordance with the form of clearance order set out as Form No. 13 in the Schedule to the Provisional Regulations dated August 19, 1930, and made by the Minister of Health under s. 57 of the Act of 1930. The order of the Corporation did not, however, include a certain note appended to Form No. 13—namely, a "starred" note to the heading of the sixth column of the Schedule in that Form setting forth the substance of s. 11 of the Act.

The applicant, Mr. William H. Bowman, was interested as owner or as lessee in some of the seventeen buildings ordered to be vacated within the period of seven days as

(1) See note post, p. 641.

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well as in some of the other buildings specified in the clearance order.

The Corporation caused a notice dated April 20, 1931, made in accordance with Form No. 14, to be served on each of the owners and lessees of buildings in the area stating (inter alia) that the Corporation had made a clearance order which was about to be submitted to the Minister of Health for confirmation, that copies of the order and of the map referred to therein had been deposited at the town clerk's office and might be seen at all reasonable hours, and that any objection to the order must be made in writing stating the grounds of objection and addressed to the Minister of Health before May 7, 1931; and the notice, in further accordance with the Form, set forth the substance of s. 2, sub-s. 3; s. 11, sub-s. 3; and First Schedule, cl. 4, of the Act.

The Corporation at the same time inserted in a local newspaper an advertisement in accordance with Form No. 15, that they had made a clearance order which would be submitted for confirmation to the Minister.

On May 8, 1931, the clearance order was submitted to the Minister for confirmation.

On June 17, 18 and 19, by direction of the Minister, a public local inquiry into the condition of the Thames Street area was held at South Shields before an inspector of the Ministry, in accordance with the First Schedule of the Act. The applicant was represented at the inquiry, and objections to the clearance order were taken on his behalf.

On July 8, 1931, the inspector made his report to the Minister.

On October 6, 1931, the Minister confirmed the clearance order, with the modifications that certain lands included in the clearance order (not being lands of the applicant) were excluded from the clearance area, and that the period of seven days was altered to twenty-eight days.

On October 13, 1931, the Corporation inserted in a local newspaper an advertisement in accordance with Form No. 16, the effect of which was that the Minister confirmed, with modifications, the clearance order, that copies of the order and of the map referred to therein and a map of the clearance area had been deposited at the town clerk's office and might be seen at all reasonable hours, and that the order would become operative at the expiration of six weeks from the date of that advertisement; but that if proceedings in the High Court were instituted within that period by an aggrieved person desirous of questioning the validity of the order, the Court might, if satisfied that the order was not within the powers of the Act, or that the interests of the applicant had been substantially prejudiced by any requirement of the Act not having been complied with, quash the order either generally or in so far as it affected any property of the applicant; and a like notice was served on every person who, like the applicant, had appeared at the inquiry in support of an objection.

On December 11, 1931, the applicant gave an amended notice of motion, entitled In the matter of the Housing Acts, 1925 and 1930, before the judge of the High Court selected by the Lord Chancellor pursuant to s. 61 and the Fourth Schedule of the Act of 1930, in respect of the clearance order, as being a person aggrieved thereby, that the order might be quashed generally, or alternatively that so much of it as ordered the demolition of the buildings of which the applicant was the owner and his vacation thereof within the periods specified might be quashed on the grounds (among others): (1.) That the order was not within the powers of the Acts, or alternatively that the requirements of the Acts had not been complied with, inasmuch as the original order made on March 9, 1931, did not comply with s. 2, sub-s. 2, and the First Schedule to the Act of 1930 in respect of the period of time for vacating the buildings or some of them. (2.) That the notice served on the applicant in accordance with the First Schedule to the Act was not in the form prescribed by s. 57 and the Regulations thereunder. (3.) That any modifications of the order as confirmed by the Minister on October 6, 1931, purporting to modify the periods within which these buildings, or any of them of which the applicant was the owner, were to be vacated were not within the powers of the Act. (4.) That at the above mentioned public local inquiry evidence of overcrowding in the area in question was improperly admitted, and the inspector in receiving that evidence and the Minister in confirming the order, after receiving that evidence, acted ultra vires and the order is not within the powers of the Act. Alternatively, by the admission of that evidence the requirements of the Acts had not been complied with. (5.) That the order was not within the powers of the Acts, or alternatively that the requirements of s. 1 of the Act of 1930 had not been complied with, inasmuch as (i.) the Corporation being the local authority had not excluded from the area in question the respective buildings, described in the schedule attached to the notice, which were not unfit for human habitation or dangerous or injurious to health, and (ii.) there was no or insufficient evidence upon which the Corporation or the Minister could find that these buildings or any of them were unfit for human habitation or dangerous or injurious to health. (6.) That the Corporation as local authority had not satisfied themselves, as prescribed by s. 1 of the Act of 1930, that in so far as suitable accommodation available for the persons of the working classes who would be displaced by the clearance of the area did not already exist the Corporation could provide or secure the provision of such accommodation in advance of the displacements which would from time to time become necessary as the demolition of buildings in the area and in different parts thereof proceeded; and alternatively that there was no or insufficient evidence that the Corporation had satisfied themselves as aforesaid.

The application came before Swift J., the judge of the High Court selected as above mentioned for the purpose of hearing applications under s. 11 of the Act.

R. M. Montgomery K.C. and *J. H. Bowman* for the applicant. The clearance order ought to be quashed by this Court under the Housing Act, 1930, s. 11, sub-s. 3, either generally or in so far as it affects any buildings in which the applicant is interested as owner or lessee, on the ground that it is not within the powers of the Act or that it does not comply with the requirements of the Act, by reason of the following defects or any of them:—

First, the order, as originally made by the Corporation, did not, in respect of some of the buildings in which the applicant is interested, comply with s. 2, sub-s. 2, and the First Schedule of the Act, inasmuch as it stated a period of less than twenty-eight days, namely, seven days only, from the date on which it was to become operative, within which these buildings were to be vacated. The order, by reason of that mistake, was invalid as regards these buildings and did not apply to them. The order as ostensibly confirmed by the Minister of Health with the modification that as regards these buildings the period of seven days was altered to twenty-eight days, did not become valid and applicable to these buildings, because it is provided by cl. 4 of the First Schedule that the order as confirmed by the Minister shall not apply to any building to which it would not have applied if it had been confirmed without modification.

Secondly, the clearance order, whether as made by the Corporation or as confirmed by the Minister, was not in the prescribed form, namely, Form No. 13, in the Schedule to the Provisional Regulations of 1930 made under the Act, as required by s. 2, sub-s. 2, and the First Schedule to the Act, inasmuch as it omitted the "starred" note to that form which sets out the important provisions of s. 11 of the Act giving the owner a right to question the validity of the clearance order in this Court. Neither the notice of the making of a clearance order (Form No. 14), nor the advertisement of making of a clearance order (Form No. 15), nor the advertisement of a clearance order confirmed by the Minister (Form No. 16), contains any reference to s. 11, and, therefore, unless the starred note be included in the order, the owner receives no intimation of his rights under that section. The starred note is an essential part of a valid clearance order, whether before or after confirmation, and its omission invalidates the order: see *Rayner* v. *Stepney Corporation*. (1) It is not a mere matter of form, but a

(1) [1911] 2 Ch. 312.

statutory requirement, that the order should not only correctly state the period within which the buildings must be vacated, but should also include the starred note: see per Brett L.J. in *Dale's Case*. (1)

[*Sir Boyd Merriman S.-G.* The applicant is not entitled to take this point about the starred note, inasmuch as it is not mentioned in his notice of motion in accordance with para. 3 of Part I. of the Fourth Schedule to the Act.]

The applicant asks the leave of the Court to amend his notice of motion by adding this ground of application.

[SWIFT J. The applicant may make the amendment.]

Thirdly, the clearance order, whether as made by the Corporation or as afterwards confirmed by the Minister, did not comply with s. 1 of the Act, inasmuch as it did not exclude from the clearance area the applicant's buildings, which were neither unfit for habitation nor dangerous or injurious to health; and, further, it was not supported by any sufficient evidence to show that these buildings were unfit for habitation or dangerous or injurious to health. Moreover, although the Act does not provide that a building is to be included in the clearance area merely because it is overcrowded, yet at the public local inquiry evidence was admitted that there was overcrowding in some of the applicant's buildings, and it is impossible to say without investigation whether that evidence may not have coloured the report of the inspector before whom the inquiry was held and thus have influenced the mind of the Minister in confirming the order. It is a requirement of the Act by s. 1 that buildings which are not unfit for habitation or dangerous or injurious to health should be excluded from the area, and it is a question for this Court under s. 11, sub-s. 3, whether the clearance order complies with that requirement as regards the applicant's buildings.

[SWIFT J. An application may be made to this Court under s. 11, sub-s. 3, only on the grounds there specified—namely, that the order is not within the powers of the Act, or that some requirement of the Act has not been complied with, or on the further ground that there was no evidence to support the order; but not on the ground that there was not sufficient evidence to support the order. In this case it cannot be contended that there was no evidence to support the findings as to the condition of these houses.]

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(1) (1881) 6 Q. B. D. 376, 455, 456.

Sir Boyd Merriman S.-G. and *W. Bowstead* for the Minister of Health. This application is misconceived, inasmuch as the clearance order ought not to be set aside by this Court under the Housing Act, 1930, s. 11, sub-s. 3, in so far as it affects the buildings of the applicant, either on the ground that it is not within the powers of the Act, or that the applicant is substantially prejudiced by any requirement of the Act not having been complied with, or that the order was based on inadmissible evidence.

The fact that the order as made by the Corporation erroneously stated that some of the applicant's buildings were to be vacated in less than the twenty-eight days from the date on which the order was to become operative as prescribed by the Act, did not make it an order not within the powers of the Act. That mistake, putting it at the highest, did not invalidate the order and prevent it from applying to the applicant's buildings, but was a mere non-compliance with a requirement as to the form of the order. The Minister in confirming the order with the modification that that mistake was corrected did not, contrary to the First Schedule, cl. 4, make it apply to any buildings to which it would not have applied if confirmed without modification. The proviso to that clause merely means that the Minister in confirming the order must not make it apply to any new buildings in addition to those already included in the schedule to the order. Though the order as originally made did not comply with the requirement to fix a period of not less than twenty-eight days within which some of the applicant's buildings were to be vacated, it now complies with that requirement seeing that the Minister has confirmed it with the modification that the period is correctly stated in it. The Minister may confirm the order with a modification removing from it any defect which, if left untouched, would prevent it from being in conformity with the Act: see per Lord Dunedin in *Minister of Health* v. *The King* (*on the Prosecution of Yaffe*). (1) Further, there is no evidence to show that the applicant has been substantially prejudiced because the order as originally made did not comply with the requirement to fix the specified period within which the buildings are to be vacated.

The omission from the clearance order, whether as originally made by the Corporation or as subsequently confirmed by the Minister, of the "starred" note appended to the official Form No. 13 in the Provisional Regulations of 1930, does not make it an order which is not within the powers of the Act. It is admitted on behalf of the Minister for the purposes of this case that it is a requirement of the Act that the starred note should be included in the order, and that by reason of its omission a requirement of the Act has not been complied with. That, however, does not entitle the applicant to have the order set aside unless he can satisfy the Court that by reason of the requirement not having been complied with his interests have been substantially prejudiced. The interests of the appellant have been in no way prejudiced by the omission of the starred note from the order. Even if the note had been in the order the appellant would not necessarily have seen it, as the order is not served upon the owners. On the other hand a notice of the making of the order (Form No. 14) is served upon each owner, and that notice contains in the body of it a full statement of the rights given by s. 11 to an aggrieved person to question the order in this Court. The case of *Rayner* v. *Stepney Corporation* (2) is distinguishable from the present case. That case arose under the Housing, Town Planning, etc., Act, 1909 (9 Edw. 7, c. 44), under which the procedure was different from that now prescribed, there being only one document which was both the order and notice thereof, and unless the note to the form of that document had been included in the document, the owner on whom it was served would have had no notice of the statutory provisions set forth in the note.

(1) [1931] A. C. 494, 504.

(2) [1911] 2 Ch. 312.

The objection that the clearance order is invalid because it may have been founded upon evidence as to the number of persons residing in these houses is not well founded. Even if it be a requirement of the Act that the order should not be founded upon evidence of that description, it does not appear that this order was to any extent based upon such evidence. It is not, however, a requirement of the Act that evidence of that character should be excluded. On the contrary it is a requirement of the Act that an inspector appointed to hold a public local inquiry under the Act as to the sanitary condition of the houses in the area should admit evidence of that character. Sect. 62, sub-s. 1, of the Act provides that the expression "sanitary defects" includes (inter alia) lack of air space or of ventilation, and absence of adequate and readily accessible water supply or sanitary accommodation or of other conveniences. An inspector appointed to inquire into the sanitary condition of the houses has, therefore, to inquire as to the sufficiency of the ventilation, of the water supply, and of the sanitary accommodation of the houses, and it would be impossible for him to investigate these matters thoroughly unless he was empowered to admit evidence as to the number of persons residing in each of the houses. The findings as to the sanitary condition and fitness for habitation of the houses, on which the clearance order is based, whether they be those of the local authority, of an inspector holding an inquiry, or of the Minister, are, however, findings of fact, and, unless it can be shown that there is no evidence to support them, this Court has no jurisdiction to disturb them or to inquire into the evidence on which they have been arrived at.

Joshua Scholefield K.C. and *W. E. P. Done* for the Corporation of South Shields. The Corporation adopts the argument which has been addressed to the Court on behalf of the Minister of Health.

As to the starred paragraph under the statutory form of clearance order in the Schedule to the Provisional Regulations, 1930 (Form No. 13), it is not a requirement of the Act that that paragraph should be included in the clearance order when made as part thereof. If that were a requirement of the Act, it would equally be a requirement that each of the paragraphs denoted by stars and asterisks under Form No. 1, Form No. 2, and other forms in the Schedule should be included in the respective documents when made, though it is obvious that these paragraphs are only intended to be directions to the clerk preparing the documents and not to be part of them. This case is distinguishable from *Rayner's* case (1), where the statement appended to a form of notice, which it was held should be included in the actual notice, was not in the circumstances a mere direction for filling up the notice, but a note necessary for the information of the recipient of the notice. In that case the order and the notice of it were one and the same document, and unless the note had been included in it the owner of the house would have had no knowledge of the note; but here the order is followed by a notice to the owner giving him all the information contained in the starred paragraph, and therefore that paragraph need not be in the order. The object of the paragraph is not to inform the owner of his rights, but to warn the local authority not to take any further steps until the order becomes operative at the expiration of six weeks from the date on which notice of its confirmation is published.

Montgomery K.C. replied.

SWIFT J. On March 9, 1931, the Corporation of the county borough of South Shields in pursuance of their powers under Part I. of the Housing Act, 1930, passed a resolution to make a clearance order in respect of an area of their district, and on April 17, 1931, they made a clearance order accordingly. That order included a number of houses belonging to Mr. William H. Bowman, which were in the clearance area, and on or about April 20, 1931, notice was given by the Corporation through their town clerk to Mr. Bowman, stating that the order had been made and was about to be submitted to the Minister of Health for confirmation, that a copy of the order and of the map referred to therein might be seen at the town clerk's office, that any objection he had to make must be made in writing, that if no objection was made the Minister might confirm the order without further inquiry, that if objection was made the Minister would hold an inquiry, and that within six weeks after the order was confirmed and became operative he would have a right, if he was a person aggrieved by the order, to apply to this Court. The order was confirmed with some modifications, to which I will refer later, by the Minister of Health, and in due course it was advertised so as to become operative within six weeks of the date of the advertisement. During that period of six weeks Mr. Bowman, as he was entitled to do, thinking himself a person aggrieved by the order as it had been confirmed, moved this Court to quash the order.

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(1) [1911] 2 Ch. 312.

This is the first case that has been heard by this Court under the provisions of s. 11 of the Housing Act, 1930, and I therefore think that it is not inexpedient that I should consider for a few minutes the scope of the Act and the right of appeal to this Court of which Mr. Bowman seeks to avail himself.

The Housing Act, 1930, is one of a series of Acts which have from time to time been passed for the purpose of enabling local authorities to regulate the occupation, and indeed the existence of dwelling-houses in their districts. There have been Acts which have provided for dealing with particular insanitary houses, and Acts which have provided for schemes for the demolition of houses and the rebuilding of them or the securing of open spaces where the houses had hitherto been, and this Act of 1930 is the last of these Acts. It gives to local authorities, in my opinion, very much greater power than they have ever had before. It enables them, under proper limitations and observing due precautions, to order the owners of dwelling-houses to vacate them, to pull them down and not to erect any other buildings upon the sites save under the supervision of and subject to the conditions imposed by the local authority, and this is to be done entirely at the expense of the owner of the property and without any compensation being given to him for the loss of that which is certainly of pecuniary value to him at the time when the order is made. When an owner of property against whom an order has been made under the Act comes into this Court and complains that there has been some irregularity in the proceedings and that he is not liable to have his property taken away, it is right, I think, that his case should be entertained sympathetically and that a statute under which he is being deprived of his rights to property should be construed strictly against the local authority and favourably towards the interest of the applicant, inasmuch as he for the benefit of the community is undoubtedly suffering a substantial loss, which in my view must not be inflicted upon him unless it is quite clear that Parliament has intended that it shall. [His Lordship read the Housing Act, 1930, s. 1; s. 2, sub-ss. 1, 2; s. 62, sub-s. 1; and First Schedule; and continued :]

So far as I know, this local authority in declaring the Thames Street area of their district to be a clearance area within the meaning of s. 1 of the Act of 1930 proceeded with perfect propriety, and every step taken by them was in perfect order, with two exceptions. With reference to those two exceptionable matters Mr. Bowman appeals to this Court by virtue of the provisions of s. 11 of the Act of 1930. As I said in the course of the argument, an appeal is the creature of statute. Apart from statute there is no right in this country to appeal from one Court to another. If a person desires to appeal from one tribunal to another, be the former a judicial tribunal in the ordinary sense of the term, or a tribunal such as the Minister of Health and his department, for purposes such as I am considering in this case, he can only do so if a statute has given him the right and only within the limits which the statute giving the right lays down. Sect. 11, sub-s. 1, makes provision with respect to the validity and date of operation of clearance orders. Sub-s. 2 of that section provides that after an order has been confirmed by the Minister the local authority shall publish in a newspaper a notice stating that the order has been confirmed and naming a place where a copy of it and of the map referred to in it may be seen, and shall serve a like notice on every person who appeared at the public inquiry in support of an objection to the order. Sub-s. 3 provides: "If any person aggrieved by an order desires to question its validity on the ground that it is not within the powers of this Act or that any requirement of this Act has not been complied with, he may, within six weeks after the publication of the notice of confirmation, make an application for the purpose to the High Court, and where any such application is duly made to the Court" may take certain steps which are prescribed in the section. If, therefore, the order having been confirmed by the Minister of Health, any person feels himself aggrieved by it, he may apply to this Court under the Act on one or other or on both of two grounds, but on those grounds alone, one of the grounds being that the order as confirmed is not within the powers of the Act, and the other ground being that some requirement of the Act has not been complied with. He is not, in my view, entitled to come here and complain that the local authority have made a mistake in fact in making the order. He is not entitled to say that his house is not insanitary or unfit for human habitation, and that, therefore, the order should not have been made. These seem to me to be matters which are left by the Legislature entirely to the local authority subject to the confirmation of the Minister of Health. Sect. 1 of the Act begins by saying: "Where a local authority, upon consideration of an official representation or other information in their possession, are satisfied" that the houses in the area are unfit for human habitation, and when once the local authority say that they are satisfied as to that matter it does not seem to me that there is any power in any tribunal, unless it be the Minister of Health, to interfere with that finding of fact. There may some day arise a case, which is certainly not this case, in which it may be said that there was no material, no information and no representation before the local authority upon which they could, as reasonable people, possibly be satisfied that a clearance order ought to be made. When such a case as that arises it will be dealt with, but where, as in this case, there was obviously ample material before the local authority to justify them in making the clearance order if they thought fit to do so, it does not seem to me that this Court has any right to interfere. I do not think that this Court is authorized to retry or rehear the case, or to reconsider the matters with which the local authority has been intrusted, or to interfere in the decision at which they have arrived. On these grounds I declined at an earlier stage of the proceedings to accede to Mr. Montgomery's request that I should hear evidence on the question whether or not in regard to particular houses the order ought to have been made. Mr. Montgomery, with that candour with which he always treats the Court, and with which the Court expects to be treated by members of the Bar, stated to me that he could not say that there was not evidence upon which the local authority might have come to the conclusion to which they did come and that the case was one in which there was no evidence to support the conclusion. In those circumstances I held that it was a matter for the local authority and not for this Court as a court of appeal sitting over them to determine the facts, and it being admitted that there was some evidence upon which they might act, I declined to interfere in that part of the case.

The matter, therefore, comes before me under s. 11 merely to determine on the facts found whether Mr. Bowman, who alleges, and I have no doubt rightly alleges, that he is aggrieved by the order, has satisfied me that the order is invalid either on the ground that it is not within the powers of this Act or that his interests have been substantially prejudiced by any requirement of this Act not having been complied with.

Two points are taken on behalf of the appellant. The first of these points arises in this way: As the order was originally drafted and as it was originally exposed to the view of those to whom notice of it had to be given, there was inserted in the column of the schedule to it relating to the period from the date when the order would become operative within which the building was to be vacated, against a great many of the houses named in that schedule, including some of those belonging to the applicant, the words "seven days." There was in truth no power on the part of the local authority to order vacation of the premises within seven days. The Act provides in its First Schedule, which I have read, that there shall not be less than twenty-eight days after the order becomes operative within which the premises are to be vacated. When the order came before the Minister of Health that error was corrected, the words seven days being altered to twenty-eight days before the matter went further. In making that alteration the Minister obviously modified the order. As the order in its original form directed that the premises should be vacated within seven days and the Minister afterwards extended the period to twenty-eight days, giving the owner of the premises twenty-one days longer to do the act which he was required to do, the Minister effected a modification of the order as originally made and caused it to comply with the statute. Is the order nevertheless bad ? Mr. Montgomery contends that it is. He says that since the order as originally drafted allowed seven days only for each of these houses to be vacated the order was not effective as regards these houses and did not apply to them, and that none of these houses were within the order, but that they must be considered to be outside of it. He points out that by the proviso to cl. 4 of the First Schedule to the Act, which I have read, it is provided that no modification of a clearance order by the Minister of Health shall have the effect of bringing into the order a building which would not otherwise be there. He then says that as these houses, because of the erroneous insertion of the period of seven days in regard to them, were not within the order at all, the Minister of Health by altering the seven days to twenty-eight days has brought into the order, contrary to the proviso to cl. 4 of the First Schedule, houses which would not otherwise have been there. I cannot assent to that very seductive argument. I think that although the order improperly and inaccurately stated the period within which the houses were to be vacated, it nevertheless was an order applying to the houses. It may well be that it did not comply with the requirements of the Act and that it might have been found impossible to enforce it, but those houses were in it and the Minister was quite right in altering the period to twenty-eight days. That he had power to do this I am convinced, and if any authority were needed for the proposition I think it is amply covered by the passage which has been read to me from the speech of Lord Dunedin in the case of *Minister of Health* v. *The King* (*on the Prosecution of Yaffe*) (1), where he says: "The last words of limitation seem to me to show that otherwise the Minister is unfettered in the conditions which he may impose, or modifications he may make. I do not, of course, suggest that if there was something sent up which was really not a scheme at all, the Minister could confirm it. He is not the author of the scheme; he is the critic and the finisher of it. In particular he may, I think, remove any blot which he finds in it as presented, and in the word 'blot' I include any provision which, if left untouched, would not be in conformity with the Act." I can find no language more appropriate to describe the position where the clerk, who was filling in the form of this order, so blotted his copy that he made a twenty-eight into a seven. I think the Minister of Health was not only within his legal rights, but was right as a matter of business administration in the affairs of the country, in putting the twenty-eight back again where the seven had been inadvertently placed by the clerk.

The second point upon which it is said that the order does not come within the powers of the Act, or that there has been an irregularity and non-compliance with the requirements of the Act is this: There is prescribed by the Minister of Health a form to be used in the making of the order, and on that form there are notes of instruction to the person who has to fill in the order. They are at the foot of the form of the order and they are headed "Directions for filling up this form." In the body of the form there are figures inserted calling attention to the corresponding notes in the directions, and in the schedule to the form there is a star calling attention

(1) [1931] A. C. 494, 504.

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BOWMAN, *In re.* SOUTH SHIELDS (THAMES STREET) CLEARANCE ORDER, 1931.

Swift J.

to a note which is starred in the directions. It is said on behalf of the applicant that those notes or directions for filling up the form are part of the form, and that, because the starred note was not in the order as it was deposited in the office of the local authority, the applicant is entitled to have the order quashed. As to the question whether or not that starred note is part of the form, my attention was called to the case of *Rayner* v. *Stepney Corporation.* (1) In that case Neville J. held that sections of an Act which had been set out at the foot of a form of notice to close a dwelling-house ought to have been set out on the notice so that the owner of the dwelling-house might observe the rights which the law gave him as to appeal, and so forth. I do not think that that case is applicable to the one which I am now considering. In that case the notice giving the rights of appeal, the document upon which the learned judge held that the right of appeal should be specified, was a document which had to be served upon the owner of the house. In this case it is not so. Here the order has not to be served upon the owner, but a notice of it has to be served, and if it be any part of the scheme of the Legislature that the owner of the house shall have an intimation to him from the local authority what his rights of appeal are, he most certainly got it in this case, because both in the notice that the clearance order had been made and in the notice that the Minister had confirmed the clearance order, the owner of the house was informed of his rights of appeal. It is said by Mr. Montgomery that the notices did not mention the section giving the right of appeal. It is true that they did not mention the section, but they directed the applicant's attention to the Act of 1930 and informed him in express terms that Parliament had given him a right to appeal upon certain grounds, and they thus put him, at any rate, upon his guard and inquiry about it. I do not think that *Rayner's* case (1) is binding upon me in this matter. In order to ascertain what the position then is one has to look at s. 11, sub-s. 3, from the point at which I broke off when I was reading it a little earlier : " And where any such application " by a person desiring to question the validity of the order "is duly made the Court—(i) may" postpone the operation of the order until it has heard the whole case; and "(ii) if satisfied upon the hearing of the application that the order is not within the powers of this Act or that the interests of the applicant have been substantially prejudiced by any requirement of this Act not having been complied with, may quash the order either generally or in so far as it affects any property of the applicant." I am quite satisfied that this order was entirely within the powers of the Act. There is no ground for supposing that the local authority in making this order has in any way transgressed or trespassed outside of the Act. The note not having been put on the face of the order clearly does not entitle any one to question its validity on the ground that it is not within the powers of the Act. I find as a fact, if it be a question of fact, and I hold as a matter of law, if it be a matter of law, that what the local authority have done was within their powers under the Act.

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(1) [1911] 2 Ch. 312.

I should be inclined to hold further that the omission of the starred note from the order does not entitle any one to say that, within the meaning of s. 11, sub-s. 3, any requirement of the Act had not been complied with. But the Solicitor-General with great propriety has said that he regards that point as immaterial for the decision of this case, and that he would not occupy the time of the Court by arguing a point which he thinks irrelevant, but would admit for the purposes of this case that that note ought to have been upon the face of the order. That, however, does not get rid of the matter. Though it is admitted on behalf of the Minister of Health that owing to the omission of the note a requirement of the Act has not been complied with, the question then arises for consideration whether the interests of the applicant have been substantially prejudiced by that non-compliance with the requirements of the Act. I have listened, and I have listened in vain, for any suggestion that he has in any form or shape been prejudiced by that note not having been put on the order. He knew when the order was published that he had a right of appeal, having been told that in the notice. Knowing of his right of appeal he carried in his objections. Consequent upon his objections, and no doubt upon those of other people also, the Minister held an inquiry. The applicant attended at that inquiry and pointed out that the period of seven days was not a compliance with the requirements of the statute. I rather think he did not point out the absence of the starred note from the order, but if he did not do so, I am told that his representative cited the case of *Rayner* v. *Stepney Corporation.* (1) Following upon the inquiry the appellant got a notice informing him again of his right of appeal, and that the order had been confirmed. And finally, very shortly before the time expired in which he could appeal, he, having known all along that his right of appeal existed, gave notice of his appeal. I cannot imagine or conceive, nor has there been suggested to me, any way in which it can be said that the applicant's rights or interests have been substantially prejudiced, or indeed have been in the slightest degree prejudiced, by the omission of that starred note from the order, and I find as a fact that he has not been in the least degree prejudiced.

In those circumstances in my view this application fails, and the motion is dismissed. Both the Minister of Health and the Corporation will have their costs on this occasion but in future cases I think that some consideration should be given to the question whether both the Minister and the public authority should be made parties to the proceeding as it seems hard that the owner if he loses should have to pay two sets of costs.

Application dismissed.

Solicitors for applicant: *Haslam & Sanders, for Bowman & Brown, South Shields.*

Solicitor for Minister of Health: *The Solicitor to the Ministry of Health.*

Solicitors for South Shields Corporation: *Speechly, Mumford & Craig, for J. Moore Hayton, Town Clerk, South Shields.*

J. R.

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(1) [1911] 2 Ch. 312.

NOTE.

Housing Act, 1930.

PART I.

Provisions with respect to the clearance or improvement of Unhealthy Areas.

Clearance Areas.

Sect. 1: "(1) Where a local authority, upon consideration of an official representation or other information in their possession, are satisfied as respects any area in their district—

(i) that the dwelling-houses in that area are by reason of disrepair or sanitary defects unfit for human habitation, or are by reason of their bad arrangement, or the narrowness or bad arrangement of the streets, dangerous or injurious to the health of the inhabitants of the area, and that the other buildings, if any, in the area are for a like reason dangerous or injurious to the health of the said inhabitants; and

(ii) that the most satisfactory method of dealing with the conditions in the area is the demolition of all the buildings in the area,

the authority shall cause that area to be defined on a map in such manner as to exclude from the area any building which is not unfit for human habitation or dangerous or injurious to health and shall pass a resolution declaring the area so defined to be a clearance area, that is to say, an area to be cleared of all buildings in accordance with the provisions hereinafter contained:

Provided that, before passing any such resolution, the authority shall satisfy themselves—

(*a*) that in so far as suitable accommodation available for the persons of the working classes who will be displaced by the clearance of the area does not already exist, the authority can provide, or secure the provision of, such accommodation in advance of the displacements which will from time to time become necessary as the demolition of buildings in the area, or in different parts thereof, proceeds; and

(*b*) that the resources of the authority are sufficient for the purpose of carrying the resolution into effect.

(2) A local authority shall forthwith transmit to the Minister a copy of any resolution passed by them under this section, together with a statement of the number of persons of the working classes who on a day specified in the statement were occupying the buildings comprised in the clearance area.

(3) So soon as may be after a local authority have declared any area to be a clearance area, they shall, in accordance with the appropriate provisions hereafter in this Act contained, proceed to secure the clearance of the area in one or other of the following ways, or partly in one of those ways and partly in the other of them, that is to say—

(i) By ordering the demolition of the buildings in the area; or

(ii) By purchasing the land comprised in the area and themselves undertaking, or otherwise securing, the demolition of the buildings thereon."

Sect. 2: "(1) Where as respects any area declared by them to be a clearance area a local authority determine to order any buildings in the area to be demolished, they shall make and submit to the Minister, for confirmation

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by him, an order (in this Act referred to as a ' clearance order ') ordering the demolition of each of those buildings.

(2) The provisions of the First Schedule to this Act shall have effect with respect to the making, submission and confirmation of clearance orders."

Sect. 11 : " (1) The provisions of this section shall have effect with respect to the validity of clearance orders and compulsory purchase orders made under this Act, and the date on which such an order is to come into operation.

(2) So soon as may be after an order has been confirmed by the Minister, the local authority shall publish in a newspaper circulating in their district a notice in the prescribed form stating that the order has been confirmed, and naming a place where a copy of the order as confirmed and of the map referred to therein may be seen at all reasonable hours, and shall serve a like notice on every person who, having given notice to the Minister of his objection to the order, appeared at the public local inquiry in support of his objection.

(3) If any person aggrieved by an order desires to question its validity on the ground that it is not within the powers of this Act or that any requirement of this Act has not been complied with, he may, within six weeks after the publication of the notice of confirmation, make an application for the purpose to the High Court, and where any such application is duly made the Court—

(i) may by interim order suspend the operation of the order either generally or in so far as it affects any property of the applicant until the final determination of the proceedings ; and

(ii) if satisfied upon the hearing of the application that the order is not within the powers of this Act or that the interests of the applicant have been substantially prejudiced by any requirement of this Act not having been complied with, may quash the order either generally or in so far as it affects any property of the applicant.

(4) Subject to the provisions of the last preceding sub-section, an order shall not, either before or after its confirmation, be questioned by prohibition or certiorari or in any legal proceedings whatsoever, and shall become operative at the expiration of six weeks from the date on which notice of its confirmation is published in accordance with the provisions of subsection (2) of this section."

Sect. 57 : " The Minister may by regulations prescribe anything which by this or the principal Act is to be prescribed and the form of any notice, advertisement, statement or other document which is required or authorised to be used under, or for the purposes of, this or the principal Act."

Sect. 61 : " The temporary rules set out in the Fourth Schedule to this Act shall, until superseded by rules made by the appropriate rule-making authority, have effect for the purposes of any proceedings under this Act which fall to be regulated by rules of court."

Sect. 62 : " (1) For the purposes of this or the principal Act [the Housing Act, 1925 (15 Geo. 5, c. 14)], unless the context otherwise requires— . . . .

The expression ' sanitary defects ' includes lack of air space or of ventilation, darkness, dampness, absence of adequate and readily accessible water supply or sanitary accommodation or of other conveniences and inadequate paving or drainage of courts, yards or passages."

SCHEDULES.

First Schedule.

Clearance Orders.

1. "A clearance order shall be in the prescribed form and shall describe by reference to a map the area to which it applies, and shall fix by reference to the date on which it becomes operative the period, not being less than twenty-eight days from that date, within which the authority require the buildings in the area to be vacated for the purposes of demolition, and for that purpose may fix different periods as respects different buildings.

2. Before submitting the order to the Minister the local authority shall—

(*a*) publish in one or more newspapers circulating within their district a notice in the prescribed form stating the fact of such an order having been made and describing the area comprised therein and naming a place where a copy of the order and of the map referred to therein may be seen at all reasonable hours; and

(*b*) serve on every owner, lessee and occupier (except tenants for a month or a less period than a month) of any building included in the area to which the order relates and so far as it is reasonably practicable to ascertain such persons, on every mortgagee thereof, a notice in the prescribed form stating the effect of the order and that it is about to be submitted to the Minister for confirmation, and specifying the time within and the manner in which objections thereto can be made.

3. So soon as may be after the required notices have been given, the local authority shall submit the order to the Minister for confirmation.

4. If no objection is duly made by any of the persons upon whom notices are required to be served, or if all objections so made are withdrawn, the Minister may, if he thinks fit, confirm the order with or without modification; but in any other case he shall, before confirming the order, cause a public local inquiry to be held and shall consider any objection not withdrawn and the report of the person who held the inquiry, and may then confirm the order, either with or without modification:

Provided that the order as confirmed by the Minister shall not apply to any building to which the order would not have applied if it had been confirmed without modification."

The Provisional Regulations, dated August 19, 1930, made by the Minister of Health under s. 57 of the Act of 1930, set out in the Schedule thereto the various forms of order, notice and advertisement to be used under the Housing Acts, 1925 and 1930, in all cases to which those forms are applicable

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THE KING *v.* ALFRED GEORGE HINDS.

Criminal Law—Evidence—Identifying Witness—Previous Inspection of Photographs—Weight of Evidence—Direction as to in Summing-up, whether necessary.

It is not essential to the sufficiency of the summing-up that the judge should state that the evidence of witnesses who have identified the defendant at an identification parade may possibly be of less weight by reason of their having previously picked out his photograph from amongst those of other persons.

Rex v. *Dwyer and Ferguson* [1925] 2 K. B. 799 distinguished and observations considered.

Appeal against conviction.

On April 25, 1932, Mr. Francis Neville Snook, the treasury officer of Lloyds Bank, Portsmouth, and Mr. Robert George Poor, a messenger of the bank, were taking a sum of 23,477*l.* in notes from the bank to the post office, the money being carried by Mr. Poor in a canvas bag. A motor-car was pulled up beside them containing several men, one of whom alighted, assaulted Mr. Snook and Mr. Poor, partly blinding the latter, snatched the bag and remounted the car, which was rapidly driven away.

On May 2, 1932, the appellant and another man were arrested and charged in respect of the matter with robbery with violence, and afterwards a third man was arrested and charged with that offence.

In June, 1932, the three prisoners were committed for trial.

On July 11, 1932, they were tried together at Winchester before Avory J. and a jury.

There was evidence to show that on April 28, 1932, a series of photographs, including that of the appellant, was exhibited to persons with a view to ascertaining whether they could identify him; that on May 2, 1932, an identification parade took place at Cannon Row police station, at which the appellant and another of the defendants were identified by witnesses who had previously seen the photographs; and that on May 10, 1932, a further identification parade was held at Portsmouth at which these defendants were again identified.

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In summing up the case to the jury Avory J. made the following observations in regard to the showing of photographs to witnesses: "The law, so far as it is necessary to apply it in this case, I tell you with regard to that matter is this: that there is no objection to the police who are seeking for information as to the person or persons who may have committed a crime showing to persons who are able to identify the criminal a photograph or a series of photographs to see if they can pick out any one of them which resembles the person whom they think they would be able to identify. What is objectionable is, if a witness has identified an accused person, for the police to try and corroborate the evidence of that witness by showing him or her a photograph of the actual person whom they have already identified; but there is no suggestion in this case that anything of that kind has been done. There is no ground for suggesting that the police have in any way infringed any rule of conduct in the showing of photographs to the witnesses who have been called in this case."

On July 11, 1932, all the defendants were convicted and sentenced, the appellant being sentenced to four years' penal servitude and fifteen strokes of the cat.

On July 13, 1932, the appellant gave notice of an application for leave to appeal against his conviction, one of the grounds of the application being misdirection by the learned judge in telling the jury that the showing of the appellant's photographs to persons who were to be subsequently asked to identify him was not objectionable and was in order.

Humphreys J. granted the application only on the ground above mentioned.

G. L. Hardy for the appellant. The learned judge misdirected the jury by telling them that the showing of the appellant's photographs to identifying witnesses was not irregular: *Rex* v. *Dwyer and Ferguson.* (1) Even if there was no actual misdirection, the summing-up was insufficient, inasmuch as the judge did not warn the jury that the evidence of identifying witnesses must be weakened by their having previously seen a photograph of the accused person: *Rex* v. *Chadwick* (1); *Rex* v. *Goss* (2); and *Rex* v. *Dwyer and Ferguson.* (3)

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(1) [1925] 2 K. B. 799; 18 Cr. App. R. 145.

O'Connor K.C. and *M. Campbell-Johnston* for the Crown were not called upon.

HUMPHREYS J. delivered the judgment of the Court as follows: The appellant appeals against his conviction on the ground that at the trial Avory J. misdirected the jury in regard to the law relating to the showing of photographs to identifying witnesses.

According to the transcript of the shorthand note of the proceedings at the trial, police inspector Turner, the officer in charge of the case, in cross-examination by Mr. Hardy, on being asked whether the witnesses were shown the photographs as they came in to make their statements at the identification parade, replied: "I don't think so. They were not shown photographs until the arrest of these men had been effected." If that statement of the facts is correct the matter would require consideration, because there are cases, such as *Rex* v. *Haslam* (4), in which this Court has expressed the view that it is undesirable that photographs of a person already under arrest should be shown to witnesses just before attending an identification parade for the purpose of seeing whether they pick out that person as the person whom they suspect. It appears, however, that the statement is not correct, and that what the inspector meant to say was that the witnesses were not shown photographs after the appellant had been arrested. It is clear that the judge at the trial took that view of the inspector's evidence. This Court, we think, should proceed upon the basis that, if there was any irregularity on the part of the police, it was merely in respect of the showing of photographs to witnesses with the object of ascertaining whether they could pick out a person not yet in custody so that he might be arrested on suspicion.

(1) (1917) 12 Cr. App. R. 247.

(2) (1923) 17 Cr. App. R. 196.

(3) [1925] 2 K. B. 799; 18 Cr. App. R. 145.

(4) (1925) 19 Cr. App. R. 59.

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Mr. Hardy is now reduced to the necessity of saying that Avory J. misdirected the jury as to the photographs. We think that he directed them with perfect accuracy and in accordance with the decisions. What he said was this: [His Lordship read the observations from the summing-up which are set out above, and continued :] The view of this Court is that this is a sufficient and correct direction. Mr. Hardy does not seriously deny that it is correct so far as it goes, but he submits that it should go further. He says that seeing that certain witnesses were not only able to pick out the appellant at the identification parade, but that they had been able at an antecedent period to pick out his photograph from among those of other persons, the judge should have pointed out to the jury that the evidence of these witnesses was less valuable than it would otherwise have been. It does not appear from the authorities that the judge was under any obligation to do that. We do not think that anything in the case of *Rex* v. *Dwyer and Ferguson* (1) made it necessary for him to do so. Reliance appears to be placed upon some statements at the end of the judgment in that case. These statements formed no part of the actual decision. That case, moreover, was very different from the present case. There witnesses who had only seen the suspects in the dark were shown separate photographs of them before being invited to identify them, and during the trial photographs of them were handed to and inspected by the jury. In this case it was not necessary that the judge should make to the jury the statement which it is said that he should have made. There was here ample evidence of identification and the jury accepted it as sufficient.

Appeal dismissed.

Solicitors for appellant : *Marris & Shepherd.*
Solicitor for prosecution : *Director of Public Prosecutions.*

(1) [1925] 2 K. B. 799 ; 18 Cr. App. R. 145.

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UNION COLD STORAGE COMPANY *v.* MOON.

Rating—Derating—Freight Transport Hereditament—Wharf, Warehouse and Cold Store—User for Storage or Transport Purposes—Apportionment—Rating and Valuation (Apportionment) Act, 1928 (18 *&* 19 *Geo.* 5, *c.* 44), *ss.* 5, 6.

The appellant company occupied two hereditaments abutting on the Thames which were used as cold stores, being equipped with refrigerating machinery and insulation necessary for dealing with shipments of refrigerated goods arriving in the port of London from colonial and foreign markets. The goods were brought to the hereditaments from the ocean-going steamers in insulated barges on delivery into which the liability of the shipowners ceased. The goods were sorted to marks in the hereditaments. In one of these 17½ per cent. of the goods were delivered out immediately after sorting, while of the balance of 82½ per cent. part did not remain in the hereditament longer than twenty-eight days, and part remained for a longer period. In the other hereditament 12 per cent. were delivered out immediately after sorting, the balance remaining for a period up to twenty-eight days or longer. Each hereditament had, besides its refrigerating chambers and machinery, a crane for the unshipping of goods, a non-insulated reception front and a non-insulated delivery front. On a claim by the appellant company for the derating of the hereditaments:—

Held, (1.) that the hereditaments, so far as regarded the refrigerating machinery and chambers, were, within s. 6, sub-s. 3 (*b*), of the Rating and Valuation (Apportionment) Act, 1928, " primarily occupied and used for warehousing merchandise not in the course of being transported," and therefore were not entitled to be derated; (2.) that the crane, non-insulated reception front and non-insulated delivery front were primarily used for dock purposes, and were entitled to be derated; and therefore (3.) that the value of the hereditaments for derating purposes must be apportioned, the apportionment being between the value of the refrigerating chambers, etc., which were not the subject of derating, on the one hand, and the value of the crane, non-insulated reception and delivery fronts which were the subject of derating, on the other hand.

Per Scrutton L.J.: The primary use of refrigerating chambers is to store goods not being transported, rather than, like barges, to serve as a means of transport.

Decision of the Divisional Court affirmed.

APPEAL from a decision of the Divisional Court on a Case stated by London Quarter Sessions.

At Quarter Sessions on October 15, 1931, the Union Cold Storage Company appealed against the decision of the

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Southwark Assessment Committee to exclude from the Special List for the Southwark rating area as a freight transport hereditament the hereditament described as follows :—

Assessment No.	Premises.	Net annual value.
1416	Wharf, cold stores and offices, Vestey's Wharf, and Upper Ground Street .	1180*l.*
1434	Cold store, offices, wharf and appurtenances, Nelson's Wharf (including Nelson's Wharf, Commercial Road) .	8250*l.*
1469	Warehouse and Dispatch Department, Nelson's Wharf, Upper Ground Street	375*l.*

The following facts were admitted or proved :—

The said hereditaments, which were occupied by the appellants, were not bonded warehouses. Parts of those buildings were equipped with machinery and insulation necessary for dealing with shipments of refrigerated goods arriving in the port of London from colonial and foreign markets.

The produce was delivered at Vestey's Wharf and Nelson's Wharf from lighters. The lighters come up to the wharves by water, and the produce, consisting of frozen meat, rabbits and other refrigerated products, was by means of a crane and slings affixed to the exterior of the hereditament unshipped from the lighters berthed alongside on to different floors of the buildings. On occasions it was shipped back into the lighters out of the building, but in the main the goods were taken into the building from the lighters and were then sent out again by road. The produce dealt with at the hereditaments and each of them was not the property of the appellants.

The commodities were brought to the hereditaments from refrigerated ships in insulated lighters, and it was essential that they should not be exposed to the air for any avoidable

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length of time. Sorting to marks took place, but it was necessary for this to be done in refrigerated conditions, in which such commodities could go straight through the premises without any pause. Only a small quantity of produce dealt with was non-refrigerated produce.

The sorting and assembling to marks consisted of an elaborate process, and was an indispensable preliminary to giving delivery or forwarding landing advices. After the sorting, the consignee was notified of the arrival and landing of the commodities according to each particular mark, the correct number of each mark being notified, and orders were then received from the consignee for delivery. The bulk of the commodities went straight to Smithfield Market after sorting, but some of them, according to the orders of the consignee, might be dispatched in railway or road transport vans to other parts of the country, those deliveries mainly taking place within the period covered by the consolidated rate hereinafter referred to.

The two following summaries, which were proved in evidence, were annexed to the Case, showing in each case the quantity of goods landed during given periods and the manner in which those goods were dealt with after landing and sorting at the said wharves :—

HANBURY'S OR VESTEY'S WHARF.

	Number of Insulated Lighters received and discharged.	Weight.
Year ending September 30, 1929	239	8124 tons.
Six months ending September 30, 1929	111	3567 tons.

Summary showing disposal of 3567 tons refrigerated produce received as above during six months ending September 30, 1929 :—

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Landed and delivered immediately after sorting . . .	631	tons or	17½	per cent.
Further deliveries within period of management rate . .	1410	,,	39½	,,
Total deliveries within period of management rate . .	2041	,,	57	,,
Delivered within second month .	666	,,	19	,,
Delivered after two months .	860	,,	24	,,
	3567			

NELSON'S WHARF.

	Number of Lighters received and discharged.	Weight.
Year ending September 30, 1929	1634 insulated	64,256 tons refrigerated produce.
Ditto	171 non-insulated	9,807 tons general produce.
		74,063 tons received.
Quarter ending June 30, 1929	389 insulated	17,192 tons refrigerated produce.
Ditto	35 non-insulated	2,020 tons general produce.
		19,212 tons received.

During the quarter ending June 30, 1929, there were loaded outwards 11 insulated lighters, representing 177 tons of

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refrigerated produce, and 6 non-insulated lighters, representing 74 tons general produce.

The premises known as Nelson's Wharf comprised two buildings, one in Southwark and the other in Lambeth. All the river-borne traffic for both buildings was landed at or shipped from the Southwark building, which abuts on the Thames. The business was one unit, and all the tonnage records were kept in one set of books, irrespective of the building in which the traffic was being handled. The analysis of the figures for the quarter ending June 30, 1929, showed the following result :—

	Refrigerated Produce.	General Produce.	Total.	Per cent. of Total Tonnage.
Landed and delivered immediately after sorting . .	787	2,020	2,807	14½
Landed, sorted and piled on refrigerated floors in Southwark building for immediate delivery to Central Market Cold Stores on completion of lots	1,225	—	1,225	6½
Delivered after landing and sorting but within the management period of 28 days . . 6,444 tons	6,444	—	6,444	33½
Delivered during 2nd month . . 2,753 ,,	2,753	—	2,753	14½
Delivered after 2nd month . . 5,983 ,,	5,983	—	5,983	31
15,180 ,,	17,192	2,020	19,212	100

As soon as the refrigerated produce was landed, it was dealt with impartially on any available refrigerated floor in either building, and the capacities of these floors were in the proportions of 60 per cent. for the Southwark building and 40 per cent. for the Lambeth building. In order, therefore, to arrive at the movement of tonnage received in the Nelson's

Wharf Southwark building for the quarter ending June 30, 1929, the following calculation was made :—

	Refrigerated Produce.	Per cent. of Total Refrigerated Produce.	General Produce.	Per cent. of Total General Produce.	Totals.	Per cent. of Total Tonnage.
Landed and delivered immediately after sorting	787	4½	2,020	100	2,807	14½
Landed, sorted and piled on refrigerated floors, for immediate delivery to Central Market Stores on completion of lots . . .	1,225	7	—	—	1,225	6½
Proportion delivered direct to Lambeth building after landing at Southwark building and partial sorting, 40 per cent. of 15,180 tons .	6,072	35½	—	—	6,072	32
Delivered after landing, within the management period of 28 days, 60 per cent. of 6444 tons . . .	3,866	22½	—	—	3,866	20
Total delivered immediately or within 28 days .	11,950	69½	2,020	100	13,970	73
Delivered within second month, 60 per cent. of 2753 tons . .	1,652	9½	—	—	1,652	8½
Delivered after second month, 60 per cent. of 5983 tons . .	3,590	21	—	—	3,590	18½
	17,192	100	2,020	100	19,212	100

The commodities coming by refrigerated vessels into the port of London were the subject-matter of the usual bills of lading, which were indorsed by the shipper and sent to the importer in London, who in turn handed them to the appellants indorsed in their favour. The commodities were then delivered to the appellants into the appellants' own lighters ex ship, the lighters being supplied by the appellants in all cases, and usually being their own property, and the commodities were transported in these insulated lighters to the appellants' premises and landed thereat as previously described.

Orders were received from customers to deliver consignments as soon as they were available; as soon as they could be landed from the lighters. A certain proportion of a consignment might be sent for within a day or two, a further proportion in a fortnight's time, and at varying intervals until the total amount of the consignment was exhausted.

The shipowner's duty was complete when he delivered over the ship's rail, and he did not pay any part of the consolidated rate which was payable by the importer, nor was he responsible for the sorting to marks.

The appellants contended that they occupied the hereditaments in connection with their business of wharfingers and in connection with the shipping and unshipping of merchandise in the course of transportation. The merchandise dealt with did not belong to the appellants, and that portion thereof which was not immediately delivered was after unshipping kept under conditions of refrigeration during the transit for a reasonable time before delivery to the consignees. Accordingly they contended that the purposes for which the hereditaments were used were the purposes of transport within the meaning of s. 5 of the Act of 1928, and that the said hereditaments not being primarily used for any of the purposes mentioned in the proviso to s. 6 of the said Act the same ought to have been inserted and distinguished in the said Special List as being freight transport hereditaments.

On behalf of the respondent the Revenue Officer it was contended: (*a*) That the hereditaments were not freight transport hereditaments within the meaning of s. 5 of the Rating and Valuation (Apportionment) Act, 1928; (*b*) that the hereditaments were not freight transport hereditaments within the meaning of the section in that they were and each of them was occupied and used for the purposes of the warehousing of merchandise not in the course of being transported and/or that they were and each of them was not occupied and used for dock purposes as part of a dock undertaking ; (*c*) that if, contrary to the respondent's contention, the hereditaments were freight transport hereditaments the net annual value thereof should be apportioned between transport purposes and other purposes in the manner prescribed by s. 6 of the Rating and Valuation Act, 1928 ; (*d*) that upon the facts the hereditaments were not in law freight transport hereditaments within the meaning of the Rating and Valuation (Apportionment) Act, 1928.

On the above facts Quarter Sessions were of opinion that the hereditaments were freight transport hereditaments within the meaning of s. 5 of the Rating and Valuation (Apportionment) Act, 1928 ; they were not satisfied on the evidence that any part of the hereditaments being a building, yard or other place was primarily occupied and used for warehousing merchandise not in the course of being transported within the meaning of proviso (*b*) to s. 6, sub-s. 3, of the said Act. Quarter Sessions therefore allowed the appeal.

The question for the opinion of the Court was whether Quarter Sessions came to a correct determination in point of law.

The Divisional Court allowed the appeal, holding that part of the hereditaments was primarily occupied and used for warehousing merchandise not in the course of being transported within the meaning of the proviso to s. 6, sub-s. 3 (*b*), of the Rating and Valuation (Apportionment) Act, 1928 (1), and that there must be an apportionment.

The Union Cold Storage Company appealed.

Comyns Carr K.C. and *Granville Sharp* for the appellants. The Divisional Court was wrong in the conclusion at which it arrived. Quarter Sessions were entitled on the evidence to find that the warehousing that took place was warehousing in the course of transit, and therefore the hereditaments were derateable. Transport is not limited to any particular kind of transport. The question really is: Is this Court entitled to say as a matter of law that Quarter Sessions was bound to hold on the figures before them that the primary user of any part of or the whole of the hereditaments was warehousing not in the course of being transported? That is a question of degree and therefore of fact.

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(1) This, and the other material provisions of the Rating and Valuation (Apportionment) Act, 1928, are set out in the judgment of Scrutton L.J.

[*Mersey Docks and Harbour Board* v. *West Derby Assessment Committee* (1) was referred to.]

Sir Thomas Inskip A.-G. and *Wilfrid Lewis* for the respondent.

[SCRUTTON L.J. The Court is at present disposed to affirm the judgment of the Divisional Court, but we think that that Court has not given to the Assessment Committee any very clear directions how to proceed as to apportionment. We should like to hear you as to the directions you consider should be given to the Assessment Committee.]

Sir Thomas Inskip A.-G. The transport to be considered is the transport by the ocean-going steamer, and that transport ended when the goods were delivered over the rail into the barges; thereafter the goods were no longer in transit. If that view is correct it follows that the whole of the hereditaments in question were being used for the warehousing of goods not in the course of being transported. If, however, the Court should take the view that there was a second voyage—namely, in the lighters to the hereditaments, parts of those hereditaments, as, for instance, the hoists, cranes and landing platforms, may be said to be used for dock purposes, and as such entitled to be derated.

Cur. adv. vult.

July 18. The following judgments were read:—

SCRUTTON L.J. This appeal is part of a skilfully planned campaign by owners of cold stores, refrigerating, to secure at the expense of other ratepayers, the relief from rates known as "derating." Whether they have done so depends on the language used by Parliament in bestowing its benefits, and, unfortunately, the results of Parliamentary legislation so far do not show that Parliament paid much attention to the merits of the recipients of benefit, otherwise breweries, one of the few prosperous industries in the country, would not be derated, while hereditaments used for testing cables were excluded. I have, however, received a very clear impression from the language of the 1928 Act that Parliament did not intend to give the benefit of derating to premises whose primary purpose and use was storage or warehousing. From industrial hereditaments to be derated, those were excluded whose primary purpose and use was storage: s. 3. In the case of freight transport hereditaments, those were excluded in whole or part which were primarily occupied and used for warehousing merchandise not in course of transport: s. 6, sub-s. 3 (*b*). But the language of the Act as to apportionment between different purposes, primary or secondary, gives rise to great difficulties.

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(1) [1932] 1 K. B. 40.

The cold storage industry commenced their campaign by selecting an inland store not directly communicating with water, at Manchester, endeavouring to get it derated as an industrial hereditament. They had another store at Manchester on the Ship Canal, which might be argued, as in the present case, to be for the primary purpose or use of a "dock" as defined in the Act; but they confined their first attack to an inland store. They failed in the Court of Appeal and the House of Lords (1); it was held that the primary purpose and use of inland cold stores was "storage," and that refrigeration did not come within the definition of a "factory purpose" so as to secure apportionment.

The cold stores industry then proceeded to their second line of attack, to get stores adjoining water derated in whole or part as occupied and used in whole or part for "dock purposes." For this purpose two stores of the Union Cold

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(1) See *Union Cold Storage Co.* v. *Bancroft* [1931] A. C. 459, affirming decision of the C. A. [1931] 1 K. B. 410.

Storage Company were selected: (1.) Vestey's (or Hanbury's) Wharf, near Blackfriars Bridge, abutting on the Thames; (2.) Nelson's Wharf, also abutting on the Thames. They were both in the borough of Southwark, but Nelson's Wharf was connected by a bridge over a street with another refrigerated warehouse having no river frontage, but in the borough of Lambeth. The Southwark Assessment Committee refused to derate. On appeal, the London Quarter Sessions held that the hereditaments were subject-matter for derating, and were not subject-matter of apportionment in respect of the purposes for which they were used. On appeal by the rating authority, it was admitted that the premises were in whole or part a freight transport hereditament, but the Divisional Court held that apportionment was necessary and remitted the matter to the Assessment Committee without any directions as to the principle on which they were to apportion. The Union Cold Storage Company now appeal against the remission for apportionment, arguing, as I understand them, that the question was one of fact for the Quarter Sessions, or that, if it was one of principle, their decision was correct in principle.

I deal first with the construction of the statute, and then with its application to the facts of this case.

One class of freight transport hereditament is mentioned in s. 5, sub-s. 1 (*c*): "A hereditament occupied and used wholly or partly for dock purposes as part of a dock undertaking being an undertaking whereof a substantial proportion of the volume of business is concerned with the shipping and unshipping of merchandise not belonging to or intended for the use of the undertakers." A "dock" includes any wharf, pier or jetty at which vessels can unship merchandise, and a "vessel" includes any vessel used in navigation, and obviously therefore the refrigerated lighter in which refrigerated goods are brought from the ocean-going ship to these wharves. These hereditaments as wharves or jetties are therefore clearly used in part for dock purposes, and the unshipping of the frozen meat is a substantial part of the business of these "docks." So far the matter is fairly simple. But s. 6 of the Act removes any elements of simplicity from the question. Sect. 5 contemplates that a freight transport hereditament may be only partly used for dock purposes. What is to happen to the part that is not used for dock purposes, or to the hereditament when it is not being used for dock purposes, and how is the part, or the partial use in space or time, to be defined or apportioned ?

I turn to s. 6, sub-s. 1 : " . . . . As respects every such hereditament occupied and used partly for transport purposes the net annual value thereof shall be shown in the prescribed manner as being apportioned between the occupation and user of the hereditament for transport purposes and the occupation and user thereof for other purposes." So far the apportionment is of value, and not of premises, and depends on " occupation and user " which is not required to be exclusive. A physical part of the premises may be occupied and used at one time for one purpose, at another time for another purpose, or at the same time for both purposes. Sect. 6, sub-s. 3, then says : " For the purpose of determining in what proportions a freight transport hereditament is occupied and used for transport purposes and for other purposes, respectively, the hereditament shall be deemed to be occupied and used for transport purposes, except in so far as it is occupied and used for the purposes of a dwelling-house, hotel, or place of public refreshment." This by itself appears to mean that though a freight transport hereditament is not being occupied or used for transport purposes, e.g., so far as it is being used for a bonded warehouse, or refrigerating storage, it is to be deemed to be occupied and used for transport purposes unless it is occupied and used as a dwelling-house or hotel. Up to this stage, the sub-section appears to destroy the greater part of the application of s. 6, sub-s. 1. But then come two provisoes, on the second of which (*b*) a great deal of this case depends. Sect. 6, sub-s. 3 (*b*), reads : " In the case of a hereditament occupied and used . . . . for dock purposes as part of a dock undertaking no part of the hereditament, being a building, yard, or other place primarily occupied and used for warehousing merchandise

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not in the course of being transported, shall be deemed to be occupied and used for transport purposes." This appears to require us to see whether the whole hereditament, or any part thereof, is primarily occupied or used for warehousing merchandise not in the course of being transported, and if it is to exclude it from the benefits of derating. On this it is to be noted that a hereditament, or part thereof, may be "primarily" used for one purpose, and yet secondarily used for another purpose at the same time, or as to the same part at another time. The uses may be in such proportions that you cannot say either is primary, in which case, but for the commencement of s. 6, sub-s. 3, there would be apportionment, but in view of that commencement the other purpose would have to be a dwelling-house, etc., to secure apportionment. The operation of s. 6, sub-s. 1, is stopped by the commencement of s. 6, sub-s. 3. In my view the construction and result of s. 6 as a whole is as follows: The direction to apportion contained in sub-s. 1 is restricted in two respects by sub-s. 3. First, if the whole or part of the hereditament is primarily used for warehousing merchandise not in course of being transported, the premises so primarily used are not to be deemed to be used for transport purposes, though there is a secondary use of such premises for transport purposes. Secondly, unless premises are shut out from being subject-matter of derating or apportionment by the first restriction, they are to be deemed wholly used for transport purposes, though in fact they are partly used for other purposes, unless those other uses are for a dwelling-house, hotel, or place of public refreshment, when there can be apportionment.

It is suggested that the main body of sub-s. 3 and proviso (*b*) cancel each other and leave sub-s. 1 requiring apportionment. But to apportion premises primarily used for storage not in course of transport seems to me directly contrary to proviso (*b*). You cannot apportion premises which are not to be deemed to be occupied and used for transport purposes; or, which is the same thing, to be deemed not to be occupied and used for transport purposes.

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I understood the argument for the Cold Stores to be that on the facts found in this case it was impossible as a matter of law to find that any part of the building was primarily used for warehousing not in course of transport, and that as a matter of fact the Quarter Sessions had said they were not satisfied. The finding in the Case was: "We were not satisfied on the evidence before us that any part of the said hereditaments being a building, yard, or other place was primarily occupied and used for warehousing merchandise not in the course of being transported within the meaning of proviso (*b*) to sub-s. 3 of s. 6 of the said Act." This, being a matter of fact, was entirely for them. This would, I think, be so if the question is one of degree and there is no error in principle, and we so treated it in the case of the Liverpool Grain Warehouses (1) where, however, no question of apportionment arose. In that case, however, the facts were very different: the elaborate elevator for shipping and unshipping, which was of no use for storing, was occupied and used all over the building; in the present case the apparatus for shipping and unshipping was very limited. I will deal with the important limitation, "storage not in course of transport," when I have dealt with the facts in this case.

As to Vestey's or Hanbury's Wharf, all the produce dealt with there is refrigerated; no unrefrigerated general produce is dealt with at this wharf. The refrigerated goods are delivered at the docks to the insulated barges of the Cold Stores, and on that correct delivery the shipowner's liability ceases. Whatever sorting to marks takes place in the cold stores (and the nature of this is not made clear in the Special Case) has nothing to do with the shipowner. It is found that 17½ per cent. of the produce coming through the stores is delivered out of the stores immediately after sorting. In regard to this percentage there is no storage not in the course of transport within the meaning of that term explained by the Court in the Liverpool cases. But the remaining 82½ per cent. of the goods dealt with at Vestey's Wharf falls into

(1) [1932] 1 K. B. 40.

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two classes: (I.) goods which, though not delivered out immediately, do not remain in the stores longer than twenty-eight days after the ocean ship first breaks bulk. Any one acquainted with shipping knows that all such goods would generally be delivered to the stores long before the end of that twenty-eight days, and they remain in the stores in refrigerated chambers till the consignee, in view of the state of the market, settles when to take them out. They are, in my opinion, stored not in course of transport. This class represents 39½ per cent. of the goods using the stores. Class II. represents the refrigerated goods which stay in the stores for a longer period than twenty-eight days from the ocean ship's breaking bulk, and represents 43 per cent. of the total tonnage.

It follows that in my opinion 82½ per cent. of the goods using the stores use them for storage not in the course of transport, and the only possible conclusion of fact is that in the language of s. 6, sub-s. 3 (*b*), the refrigerated chambers are " primarily occupied and used for warehousing merchandise not in the course of being transported," and therefore are not to be deemed to be occupied and used for transport purposes and are not to be the subject of derating. Looking through the plans of Hanbury's Wharf, it will be seen that nearly the whole building is refrigerated. The fact that as a secondary purpose goods going out immediately after sorting pass through the refrigerated chambers does not entitle those chambers to apportionment for derating once it is found, as I think is the only possible finding, that the primary purpose of the chambers is storage not in the course of transport. The refrigerating engine-room comes into the same category, as primarily used for storage not in the course of transport. But certain parts of the building, the crane and non-insulated reception front, and the non-insulated delivery front, are in my opinion primarily used for dock purposes, unshipping, and are subject-matter for derating. In my opinion, on the facts stated in the case, the Quarter Sessions were wrong in law in not being satisfied that Vestey's Wharf was primarily occupied and used for warehousing merchandise not in the course of being transported. I agree with the view of the Divisional Court that the value of the hereditament for derating purposes must be apportioned. In my view the apportionment by the Assessment Committee should be between the value of the refrigerating chambers and engine-room, which are not to be the subject of derating, on the one hand, and the value of the crane, non-insulated reception and delivery areas and the loft, on the other, which are to be the subject of derating.

Nelson's Wharf raises slightly more complicated questions. In the first place, owing to the fact that a warehouse in the street behind has no access to the river, a comparatively small quantity of non-refrigerated produce, about one-tenth, is landed on the jetty and goes straight through to the street behind on its way to the other warehouse, which is not owned by the Union Cold Storage Company. For this purpose a considerable non-refrigerated space on the ground, and perhaps first, second, and third floors, is used. As to the refrigerated goods, about 12 per cent., 2012 tons (787+1225) out of 17,192 tons, are delivered out immediately after the consignee's sorting, and are not in my view stored while not in course of being transported. But of the balance of refrigerated goods, 15,180 tons, about 40 per cent., 6444 tons, do not go out directly, but wait for a period up to twenty-eight days from the ocean ship's breaking bulk, and about 60 per cent., 8736 tons, wait longer than twenty-eight days from breaking bulk, about 38 per cent., 5983 tons, of which wait more than two months from breaking bulk. The percentages given in the case are misleading as to refrigerated goods, for they include the 2020 tons unrefrigerated goods which are never stored.

The table in the case seems to me also quite misleading in its apportionment between the Lambeth and Southwark warehouses. It may be quite fair, if the floor space in both warehouses is fully occupied, to distribute 60 per cent. of the goods to Southwark and 40 per cent. to Lambeth, though even this depends on the height to which the goods are piled. But if the stores are not full, why should it be assumed that goods are moved across to Lambeth and labour is wasted when there is room for them in Southwark. And if stores are not full, it is very probable that the engine power and freezing material will be conserved by ceasing temporarily to cool particular chambers. I cannot regard the second table in the case as of any value. I prefer to rest on the much broader proposition of fact that the primary use of refrigerating chambers is to store goods not being transported, rather than, like barges, to serve as a means of transport.

As in the result about 88 per cent. of the refrigerated goods do not go out immediately, but are stored not in the course of transport, the insulated chambers are clearly used primarily for storing goods not in course of transport and are not subject-matter for derating. The air-cooler and defroster shown on the roof plan go with the insulated chambers. The Quarter Sessions were wrong in law in not being satisfied of this on the evidence they have stated. But there is considerable floor area on the jetty and the receiving and delivery areas shown on the plans which is used for the shipping and delivery, dock purposes, and which is the subject of derating. The Assessment Committee should apportion the value of the hereditament accordingly between the value of the insulated chambers and the value of the receiving and delivery section.

In the result the appeal from the Divisional Court is dismissed with costs, but I have thought it right to give guidance to the Assessment Committee in apportioning, in the hope that I may save another series of appeals as to apportionment.

Lawrence L.J. Since writing my judgment in this case I have had the advantage of reading the judgment just delivered by Scrutton L.J. As I find myself in complete agreement with that judgment, both on the interpretation which ought to be placed upon s. 6 of the Act and on the manner in which its provisions ought to be applied to the facts of this case, I have come to the conclusion that no useful purpose would be served if I were to deliver an independent judgment restating the facts and the relevant statutory provisions, and in the result arriving at the same conclusion as my Lord. I therefore content myself by expressing my full concurrence with my Lord's judgment.

The only question upon which I entertained any real doubt at the conclusion of the arguments of counsel was whether the finding of Quarter Sessions that they were not satisfied on the evidence that any part of the hereditaments was primarily occupied and used for warehousing merchandise not in the course of being transported was open to review. On reflection, however, that doubt has been resolved. The finding is qualified by the words "within the meaning of proviso (*b*) to sub-s. 3 of s. 6 of the said Act," which qualification in my opinion shows that the finding involves, and depends for its correctness upon, the proper construction and effect of the phrase in proviso (*b*): "primarily occupied and used for warehousing merchandise not in the course of being transported." If that view be right, it follows in my judgment that the finding is one of mixed law and fact, and that the Divisional Court was right in treating it as open to review.

I agree, therefore, that this appeal fails and ought to be dismissed.

Greer L.J. I agree with my brethren that each of the hereditaments in question was primarily used for the purpose of warehousing goods not in the course of being transported, and therefore this appeal must be dismissed. I am not sure that my brethren and I are in agreement as to the right construction of s. 6 of the statute. I am inclined to adhere to the views I expressed in the Liverpool cases, but this has no bearing on the question involved in the appeal, and makes no substantial difference in the advice to be given to the Assessment Committee as to the way in which they should approach the question of apportionment. I therefore think it unnecessary, and probably it might be embarrassing, to restate views with which the majority of the Court do not agree. I agree that the appeal be dismissed with costs.

Appeal dismissed.

Solicitors for appellants: *Charles H. Wright & Tracey.*
Solicitor for respondent: *Treasury Solicitor.*

J. S. H.

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Landlord and Tenant—Agricultural Holding—Dilapidations—Action at Law—Breaches of Agreement of Tenancy—Particulars before End of Tenancy—Arbitration—Agricultural Holdings Act, 1923 (13 & 14 *Geo.* 5, *c.* 9), *s.* 16, *sub-s.* 2.

By s. 16, sub-s. 1, of the Agricultural Holdings Act, 1923: "Any question or difference arising out of any claim by the tenant of a holding against the landlord for compensation payable under this Act, or for any sums claimed to be due to the tenant from the landlord for any breach of contract or otherwise in respect of the holding, or out of any claim by the landlord against the tenant for waste wrongly committed or permitted by the tenant, or for any breach of contract or otherwise in respect of the holding, and any other question or difference of any kind whatsoever between the landlord and the tenant of the holding arising out of the termination of the tenancy of the holding or arising, whether during the tenancy or on the termination thereof, as to the construction of the contract of tenancy, and any other question which under this Act is referred to arbitration shall be determined, notwithstanding any agreement under the contract of tenancy or otherwise providing for a different method of arbitration, by a single arbitrator in accordance with the provisions set out in the Second Schedule to this Act."

By sub-s. 2: "Any such claim as is mentioned in this section shall cease to be enforceable after the expiration of two months from the termination of the tenancy unless particulars thereof have been given by the landlord to the tenant or by the tenant to the landlord, as the case may be, before the expiration of that period: Provided," etc.

As the term of a lease of an agricultural holding was coming to an end the lessee made a claim in respect of tenant right, and the lessor made various counterclaims in respect of dilapidations. An arbitrator appointed under the Agricultural Holdings Act, 1923, to settle all matters and questions between the parties in respect of the holding, stated a case under s. 16, sub-s. 4, for the opinion of the county court, in which he found that particulars of some of the lessor's claims were given within two months of the end of the lease, but that particulars of others of the claims were not given within that time. The claims related in whole or in part to acts and omissions which were in fact breaches of agreements in the lease. The county court judge held that the arbitrator could only entertain those claims of which particulars were given within the two months:—

Held, that the provision in s. 16, sub-s. 2, of the Act, barring claims unless particulars are given within the time therein specified, does not apply to claims arising from breaches of the agreement of tenancy and giving ground for actions at law independently of the Agricultural Holdings Acts, and that the arbitrator must deal with those claims without attributing importance to the fact that particulars thereof were not given within the time specified in that sub-section.

Lowther v. *Clifford* [1927] 1 K. B. 130 followed.

APPEAL from the decision of the County Court of Sussex holden at Lewes upon a case stated by an arbitrator under s. 16 and Sch. 2 of the Agricultural Holdings Act, 1923.

The special case was as follows:—

By a lease dated October 12, 1926, and made between Mrs. Emma Olive of the one part and Harold Barnard Paynter of the other part the said H. B. Paynter became tenant to Mrs. Olive, of New House Farm, Buxted, on a tenancy for a term of five years.

The lease contained agreements by the tenant to keep the dwelling-house, buildings and erections and the gates, fences and ditches in good tenantable repair, order and condition and to cultivate the land in a good and husbandlike manner in accordance with the custom of the country and to keep hedges properly trimmed and ditches clear.

The tenancy terminated on October 11, 1931, and the tenant duly vacated the premises.

In order to ascertain the amount of the usual tenant right valuation the landlady appointed Messrs. St. John Smith & Son, of Uckfield, to act on her behalf, and the tenant appointed Messrs. J. R. Thornton & Co., of Lewes, to act for him.

The valuers met at the farm on October 8, 1931. It was admitted that, before entering upon the valuation, a conversation took place between the valuers in the course of which it was intimated that a claim would be made by the landlady against the tenant for dilapidations under the terms of the lease. Subsequently on the same day, on going round the farm in the course of the valuation, Mr. St. John Smith called the attention of Mr. Henry Redman, of the firm of Messrs. J. R. Thornton & Co., to the state of the temporary pastures and stubbles with the object of informing him that he should claim in respect of the foul state of the temporary pastures and stubbles.

On November 13, 1931, Messrs. St. John Smith telephoned to Messrs. J. R. Thornton & Co. complaining of the pumping plant, and on the same day sent them a copy of the engineer's report on the same.

[The special case, after setting out certain correspondence between the valuers for the landlady and the tenant respectively, explaining the delay in giving particulars of the landlady's claim, but not otherwise material, continued as follows :—]

On December 11, 1931, an interview took place between Mr. St. John Smith and Mr. Redman in the street outside Mr. Redman's office, and at this interview it was mentioned that the landlady would have a heavy claim for dilapidations.

On December 19, 1931, the parties appointed Mr. A. K. Burtenshaw, of Hailsham, as arbitrator under the provisions of the Agricultural Holdings Act, 1923, to settle all matters and questions between them in respect of the farm ; and on the same day Messrs. J. R. Thornton received from Messrs. St. John Smith & Son a detailed list of dilapidations in writing summarized as follows :—

	£	*s.*	*d.*
House, out-buildings and garden . . .	507	15	0
Buildings and three cottages . . .	475	19	6
Hedges, ditches, gates and fences . . .	77	12	10
Foul land	114	17	6
Pump	66	8	0
	£1,242	12	10

The first hearing before the arbitrator took place on January 1, 1932. Objection was taken at this hearing by

Messrs. J. R. Thornton & Co. on behalf of the tenant that particulars of the landlady's counterclaim were not delivered within two months from the expiration of the tenancy as required by s. 16, sub-s. 2, of the Agricultural Holdings Act, 1923. (1) It was then provisionally arranged that the question whether particulars had been delivered within the meaning of the sub-section should be referred to counsel; but this arrangement fell through, and a second hearing before the arbitrator took place at Lewes on January 28 1932. Mr. Hart appeared for the landlady and Mr. Wannop for the tenant. Mr. George Stuart St. John Smith, Mr. Henry John Redman and Mr. Harold Barnard Paynter gave evidence on oath. Mr. St. John Smith stated in evidence that at the interview on October 8, 1931, he mentioned that there would be dilapidations to buildings, hedges, ditches, gates and fences, temporary pastures, and stubbles; but the conversation was not sufficiently specific to leave any impression upon Mr. Redman's mind beyond that there would be a general claim for dilapidations under the clauses of the agreement, except as regards temporary pastures and stubbles, to which Mr. St. John Smith especially called attention.

There was also some difference of opinion as to what took place at the interview between the valuers on December 11, 1931. Mr. St. John Smith stated that in conversation he made rough estimates of the amounts that would be claimed, but the arbitrator expressed the view that the conversation was not sufficiently specific to convey more to Mr. Redman's mind than that there would be a claim for dilapidations generally for a large amount. Mr. St. John Smith also stated that on December 11 the particulars were ready at his office, but that he had not delivered them owing to instructions received by him.

Mr. Hart for the landlady also submitted that the houses included in the agreement constituted a residence and therefore did not come under the Agricultural Holdings Act.

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(1) See the headnote.

The chief authorities referred to at the hearing on January 28 were *Sylvester* v. *Brown* (1); *Swinburne* v. *Andrews* (2); *Duke of Montrose* v. *Hart* (3); and *Jones* v. *Evans*. (4)

The arbitrator found as follows:—

1. The house mentioned in the agreement is part of the farm and therefore is part of an agricultural holding.

2. At the interview on October 8, 1931, verbal notice was given in general terms that a claim would be made by the landlady against the tenant for dilapidations under the clauses in the agreement, but no specific headings were clearly designated except as regards temporary pastures and stubbles.

3. Specific notice was given on November 14, 1931, that a claim for dilapidations in respect of the pumping plant would be made.

4. At the interview on December 11, 1931, notice was given by the landlady's agent that the dilapidations would amount to a considerable sum, but no details were given.

The following questions were submitted to the county court on the above findings:—

1. Were sufficient particulars given of the whole of the landlady's counterclaim within two months from the expiration of the tenancy to satisfy s. 16, sub-s. 2, of the Agricultural Holdings Act, 1923?

2. If sufficient particulars of the whole of the landlady's claim were not given, were sufficient particulars of part (and if so what part) of the landlady's counterclaim given to satisfy the requirements of s. 16 of the Act?

Although not included in the original statement of the case, the following question was also submitted by agreement between the parties:—

3. Is the landlady's counterclaim of such a nature as to fall within the provisions of s. 16 of the above named Act, and does the obligation as to particulars contained in sub-s. 2 of that section apply to the counterclaim?

(1) (1916) 85 L. J. (K. B.) 1173.

(2) [1923] 2 K. B. 483.

(3) 1925 S. C. 160.

(4) [1923] 1 K. B. 12.

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The county court judge answered the questions as follows :—

"In answering questions 1 and 2 submitted to me by the arbitrator I have endeavoured to apply the test laid down by Bankes L.J. in *Jones* v. *Evans*. (1)

"In answer to question 1, I hold that sufficient particulars of the whole of the landlady's counterclaim were not given within two months from the expiration of the tenancy as required by s. 16, sub-s. 2, of the Agricultural Holdings Act, 1923.

"In answer to question 2, I hold that sufficient particulars were given within two months from the expiration of the tenancy of so much only of the landlady's counterclaim as relates to (*a*) the temporary pastures and stubbles and (*b*) dilapidations in respect of the pumping plant. I consider that the nature of her counterclaim in respect of each of these matters was specified. In my judgment the nature of her claim in respect of the other matters in her counterclaim was not specified, though the class of claim made was indicated.

"In answer to question 3. The arbitrator and the parties agreed that I should answer this question, though it was not submitted to me in the case stated by the arbitrator. In considering it I have had regard to the decision of the Court of Appeal in *Lowther* v. *Clifford*. (2) In my judgment the landlady's counterclaim need not have been referred to arbitration under the Agricultural Holdings Act, 1923, but I hold that, as it was so referred, the obligation as to particulars contained in s. 16, sub-s. 2, of the Act applies to it, and that the arbitrator should entertain those parts of it only of which sufficient particulars were given within two months from the termination of the tenancy—namely, such parts of it as relate to (*a*) the temporary pastures and stubbles and (*b*) dilapidations in respect of the pumping plant."

The landlady appealed.

W. Hanbury Aggs and *N. H. Moller* for the appellant. The county court judge was wrong in holding that the delivery of particulars within two months from the termination of the tenancy was necessary before the appellant could establish her claim. There is no difference in principle between the present case and *Lowther* v. *Clifford* (1), in which it was held that a claim by a landlord arising out of one of the terms of a lease might be put in suit in an action at law, and that it was not necessary to refer it to arbitration before a single arbitrator under s. 16 of the Agricultural Holdings Act, 1923. In *In re Arden and Rutter* (2) it was held that a landlord might bring an action for deterioration of the holding in breach of the contract of tenancy without giving notice to the tenant before the termination of the tenancy of his intention to claim, as directed by s. 19 of the Agriculture Act, 1920, which was in the same terms as s. 10 of the Agricultural Holdings Act, 1923. In the present case the county court judge was rightly of opinion that the action might have been brought without delivery of particulars within the time specified in s. 16, sub-s. 2, but wrong in holding that, having gone to arbitration, the appellant was bound by the terms of that sub-section. That decision was beyond the jurisdiction of the learned judge, because the question whether particulars were necessary had not been submitted to him by the arbitrator under s. 16, sub-s. 4. (3) Consequently the appellant is not bound by the decision on this point: *Farquharson* v. *Morgan*. (4) In *Radcliffe* v. *Thomas* (5) in an arbitration before a single arbitrator under s. 16 of the Act the arbitrator excluded all claims arising out of the contract of tenancy on the ground that the notice under s. 10 of the Act had not been given; but this Court held that the arbitrator was wrong in so doing. Upon the same principle it is submitted that the case should be sent back to the arbitrator that he may consider the appellant's claims without reference to the question whether particulars were or were not given within the time mentioned in s. 16, sub-s. 2.

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(1) [1923] 1 K. B. 12, 18. (2) [1927] 1 K. B. 130.

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(1) [1927] 1 K. B. 130.

(2) [1923] 2 K. B. 865.

(3) Agricultural Holdings Act, 1923, s. 16, sub-s. 4: "If in any arbitration under this Act the arbitrator states a case for the opinion of the county court on any question of law, the opinion of the court on any question so stated shall be final unless within the time and in accordance with the conditions prescribed by Rules of the Supreme Court either party appeals to the court of appeal, from whose decision no appeal shall lie."

(4) [1894] 1 Q. B. 552.

(5) Unreported; heard in Court of Appeal, No. 2, April 19, 1932.

Singleton K.C. and *J. B. Richardson* (*A. J. Spencer* with them) for the respondent. Sect. 16 of the Agricultural Holdings Act, 1923, covers a very wide area; so wide that it would seem to cover every dispute which could arise between landlord and tenant not only during the continuance but after the termination of the tenancy. It expressly includes "any question or difference arising . . . . out of any claim by the landlord against the tenant . . . . for any breach of contract or otherwise in respect of the holding, and any other question or difference of any kind whatsoever between the landlord and the tenant of the holding . . . . arising, whether during the tenancy or on the termination thereof, as to the construction of the contract of tenancy." Can it be seriously argued that the claim in respect of dilapidations to the house, outbuildings, garden, cottages, hedges, ditches, gates and fences is not "a claim . . . . for any breach of contract or otherwise in respect of the holding" under a lease containing agreements by the lessee to "keep the dwelling-house, buildings and erections and the gates, fences and ditches in good tenantable repair, order, and condition and to cultivate the land in a good and husbandlike manner in accordance with the custom of the country, and to keep the hedges properly trimmed and the ditches clear"? If it is such a claim, then by s. 16, sub-s. 1, of the Act it must be determined by a single arbitrator in accordance with the provisions in the Second Schedule; but by sub-s. 2, it ceases to be enforceable unless particulars of it are given within two months after the termination of the tenancy. It does not avail the appellant to cite s. 54, which provides that, except as in the Act expressed, "nothing in this Act shall prejudicially affect any power, right, or remedy of a landlord, tenant, or other person vested in or exerciseable by him by virtue of any other Act or law, or under any custom of the country, or otherwise, in respect of a contract of tenancy or other contract, or of any improvements, deteriorations, waste, emblements, tillages, away-going crops, fixtures, tax, rate, tithe rentcharge, rent, or other thing." That section affords no help where, as in the present case, the class of claims, of which the subject matter of this appeal is one, is a class about which the Legislature has made express provision that claims included in it shall be referred to arbitration under s. 16. In *Lowther* v. *Clifford* (1) the matter in question was whether expenses incurred under the Private Street Works Act, 1892, which had been demanded of and paid by the landlords could be claimed by the landlords as " outgoings " payable to them by the lessee within the meaning of a lease upon the terms of which the defendant as tenant was holding over. It was held that s. 16 of the Agricultural Holdings Act, 1923, did not apply to that claim, and that the landlords might recover in an action at law. The case was hardly one of rights and liabilities in relation to an agricultural holding, and it does not follow that, because it happens to fall without the Act, therefore the present case should also escape.

W. Hanbury Aggs in reply.

SCRUTTON L.J. This is an appeal from the decision of a county court judge upon a case stated by an arbitrator under s. 16 of the Agricultural Holdings Act, 1923. If there had been no former decisions on the point, the Court would have taken time to consider its judgment, but in view of the authorities it is not necessary to do so. The question arises thus :—The Act contemplates that an arbitrator may under s. 16 deal with rights of landlords and tenants at common law. Then s. 54 provides that "Except as in this Act expressed, nothing in this Act shall prejudicially affect any power, right, or remedy of a landlord, tenant, or other person vested in or exerciseable by him by virtue of any other Act or law, or under any custom of the country, or otherwise, in respect of a contract of tenancy or other contract. . . . ." There are two matters in respect of which it might have been argued that powers, rights, or remedies of a landlord at common law had been prejudicially affected. One is the main provision of s. 16 that " Any question or difference arising out of any claim . . . . for any breach of contract or otherwise in respect of the holding, and any other question or difference of any kind whatsoever between the landlord and the tenant of the holding arising . . . . whether during the tenancy or on the termination thereof, as to the construction of the contract of tenancy . . . . shall be determined, notwithstanding any agreement under the contract of tenancy or otherwise providing for a different method of arbitration, by a single arbitrator." On the face of it that seems to require that any question arising under the contract of tenancy must be determined by arbitration. Does that include claims for rent, damages for wrongful distress, and questions such as whether paving expenses or the like are " outgoings " within the meaning of one of the lessee's covenants ? Did Parliament intend that in future actions for ejectment should be tried by a single arbitrator ? If these things were intended the rights of the landlord might well be prejudicially affected.

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(1) [1927] 1 K. B. 130.

The second interference with the rights of the landlord may be found in s. 10. By that section a landlord who proves to the satisfaction of an arbitrator on the termination of the tenancy of a holding that the value of the holding has been deteriorated by the tenant's failure to cultivate in accordance with good husbandry or the terms of the contract of tenancy, may obtain an award of compensation. By s. 16, sub-s. 1, the only way of obtaining compensation is before a single arbitrator in accordance with the provisions of the Second Schedule to the Act. By sub-s. 2 any claim by the landlord against the tenant in respect of the holding " shall cease to be enforceable after the expiration of two months from the termination of the tenancy unless particulars thereof have been given by the landlord to the tenant " within that time. This would alter the landlord's right at common law, for by the common law a landlord who had a claim against his tenant for not cultivating according to the terms of the contract of tenancy would have six years in which to bring his action. In *In re Arden and Rutter* (1) the question arose under s. 19 of the Agriculture Act, 1920, which was in the same terms as s. 10 of the Agricultural Holdings Act, 1923, and this Court decided that if the landlord's claim for deterioration of the holding was based on a breach of covenant or agreement in the lease, then it was not necessary in order to succeed that he should have given notice before the termination of the tenancy of his intention to claim. In *Lowther* v. *Clifford* (2) after long debate it was held that s. 16 did not operate so as to send to arbitration under the Act all questions arising between landlord and tenant under the contract of tenancy. Again in a case of *Radcliffe* v. *Thomas* (3) a landlord, who had claims against his tenant both under the contract of tenancy and also under s. 10 of the Act, and had instructed a valuer to make a valuation, brought an action against the valuer for omitting to give notice under s. 10 of the claims arising on the contract of tenancy. An arbitrator appointed to deal with both sets of claims decided all of them against the landlord on the ground that the notice was not given. We have been furnished with a note of my judgment in which my brothers agreed. I said: "The arbitrator decided that the landlord's claim could not be entertained because the notice had not been given. That was after this Court had decided *In re Arden and Rutter* (1) on the effect of s. 10. I think he was wrong, in so far as the claims under the contract of tenancy were concerned, in holding that it was necessary to give notice." Therefore this Court has taken the view that, in order to sustain a claim under a common law contract in the agreement of tenancy, it is not necessary that the plaintiff should have given the statutory notice under s. 10. To enforce a claim arising solely under the Act the claimant must of course comply with the statutory requirements with regard to the time within which notice or particulars must be given, but those requirements do not apply to claims which he would have had even if these Acts had never been passed.

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(1) [1923] 2 K. B. 865.

(2) [1927] 1 K. B. 130.

(3) Unreported.

In the present case, when the two valuers met, the only question gone into was whether the particulars were sufficient, and that was the only question upon which the arbitrator stated the case. At that stage the effect of *Lowther* v. *Clifford* (1) had not made itself felt in all valuers' offices throughout the country, and so the question whether any particulars under s. 16, sub-s. 2, were necessary was not raised before the arbitrator. When the case stated by the arbitrator came before counsel it appeared to them that this, which was the real difference between the parties, had not been submitted to him, and so they altered the special case so as to raise that question, which had never been referred to the arbitrator. The county court judge, who acceded to the request that he should consider the question, was of opinion that the landlady's counterclaim need never have been referred to arbitration under the Agricultural Holdings Act, 1923, at all, but that, as it had been so referred, the obligation to give particulars under s. 16, sub-s. 2, was binding on her, and that the arbitrator could only entertain those parts of the counterclaim of which sufficient particulars were given within two months from the termination of the tenancy. In my opinion that was wrong. Where a claim is one which might have been enforced at common law, the claimant is not bound by the limitation as to time imposed either by s. 10 or s. 16 of the Act. It follows that the case must go back to the arbitrator, who must consider those claims which would exist apart from the Act and decide them irrespectively of the question whether particulars were delivered in time or not.

With regard to the sufficiency of the particulars, I am of opinion that in the present case, as in most other cases, that is a question of fact which the arbitrator should decide for himself. Upon such questions arbitrators should not encumber the proceedings with arguments upon special cases. They are not bound to state cases merely because they are invited to. The appeal must be allowed.

Greer L.J. In my opinion it was decided in *Lowther* v. *Clifford* (1) that s. 16 of the Agricultural Holdings Act, 1923, does not operate to bar or impede claims at common law for damages for breach of covenant in an agricultural lease. Therefore it is no answer to a claim for such damages that particulars of the claim have not been given under s. 16, sub-s. 2.

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(1) [1927] 1 K. B. 130.

With regard to question 3 in the special case, no such question could come for adjudication before the county court judge unless it had been raised in argument before the arbitrator as a question of law in accordance with sub-s. 4. This question was never raised until the case came before the county court judge; accordingly the learned county court judge had no power to deal with it. This is a defect which cannot be remedied by the consent of the parties: *Simpson* v. *Crowle*. (1)

In the result this appeal partly succeeds, and the judgment of the county court judge must be varied. With regard to the temporary pastures and stubbles and the pumping plant the decision is that the particulars prescribed by the Agricultural Holdings Act, 1923, whether necessary or not, were sufficient and were delivered in time, and it is immaterial whether these claims arise at common law or under the Act. So far the judgment stands. But with regard to the claims relating to matters other than the pastures and stubbles and the pumping plant, these must go back to the arbitrator, who must deal with such of them as are for breaches of covenants in the lease, for these claims do not depend for their validity upon the delivery of particulars under s. 16, sub-s. 2, of the Act. I agree therefore that the appeal must be allowed.

SLESSER L.J. I agree, and have nothing to add.

Appeal allowed.

Solicitors for appellant: *Langhams, for Dawson & Hart, Uckfield.*

Solicitors for respondent: *Ellis & Fairbairn, for Wannop & Falconer, Littlehampton.*

W. H. G.

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(1) [1921] 3 K. B. 243.

LADIES HOSIERY AND UNDERWEAR, LIMITED *v.* WEST MIDDLESEX ASSESSMENT COMMITTEE.

C. A.
1932
May 26, 27;
June 13.

Rates—Assessment—Hereditament assessed at proper Amount—Rateable Value of other comparable Hereditaments lower—Unfairness—Rating and Valuation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 90), *ss.* 2, 18, 26, 37, 68.

The appellants, who were assessed in respect of their premises at 325*l.* gross and 267*l.* rateable value, objected that they had been incorrectly and unfairly assessed in that seven other hereditaments of the same class in the same valuation list had been assessed at lower figures. The appellants called no evidence to prove that their assessment was higher than the rent which might be expected to be obtained for their premises, and their only witness agreed that the rent would be at least 325*l.*; nor did the appellants seek to alter the assessments of the seven other hereditaments, but they sought to use these as evidence that their own assessment was excessive and unfair:—

Held, that as the appellants' hereditament had been entered in the valuation list at the proper figure, evidence that the seven other hereditaments had been assessed at a lower figure was irrelevant and could not be used to justify a reduction of the appellants' assessment. That evidence was of no weight unless for the purpose, on proper notice, of correcting the inaccuracy of the other hereditaments.

Double v. *Southampton Assessment Committee* [1922] 2 K. B. 213 distinguished.

Appeal from a decision of the Divisional Court on a case stated by Middlesex Quarter Sessions.

The Ladies Hosiery and Underwear, Ld. (hereinafter called "the appellants"), appealed from a decision of the West Middlesex Assessment Committee (hereinafter called "the respondents") accepting a proposal of the Ealing Borough Council as the rating authority for the amendment of the current valuation list by the insertion of the figures 325*l.* and 267*l.* as the gross and rateable values of a hereditament occupied by the appellants in Ealing. Middlesex Quarter Sessions allowed the appeal and ordered the valuation list to be amended by the insertion of 225*l.* and 184*l.* as the gross and rateable values of the hereditament, subject to the following case for the opinion of the Court:—

The appellants' sole ground of appeal was that their premises were incorrectly and unfairly assessed in comparison with the assessments of other hereditaments of the same class in the same valuation list. The appellants had given notice to the respondents before the hearing specifying seven hereditaments in the same neighbourhood with the assessments of which they intended to compare their own assessment for the purpose of showing its unfairness.

The appellants had given no notice to the occupiers of any of the said seven hereditaments of their intention to compare their premises therewith.

The appellants called no evidence to prove that their assessment was higher than the rent which might be expected to be obtained for their premises, and their only witness agreed that such rent would be at least 325*l.* upon the terms of a letting from year to year if the tenant undertook to pay all usual tenants' rates and taxes and tithe rentcharge (if any) and if the landlord undertook to bear the cost of the repairs and insurance and the other expenses, if any, necessary to maintain the hereditament in the state to command that rent. He further admitted that the premises were in fact let on a full-repairing lease at 425*l.* per annum.

On the evidence adduced by the appellants, and in the absence of any evidence on the part of the respondents, the following facts were established to the satisfaction of Quarter Sessions: (*a*) that the seven other hereditaments were comparable with and formed part of the same class as the premises under appeal; (*b*) that the premises under appeal were assessed on a comparatively higher basis than the seven other hereditaments; (*c*) that the seven other hereditaments were assessed at sums below the rents which would be obtained therefor.

The appellants did not seek to prove or contend that the seven other hereditaments were under-assessed, but accepted their said assessments as correct.

The respondents called no evidence, but submitted that the evidence adduced by the appellants and the grounds of their objection to their assessment disclosed no valid grounds of appeal in law for the following reasons: (*a*) that as it was admitted that the premises under appeal would command a rent equal to the amount of the gross assessment as fixed by the Assessment Committee it followed from the definition of "gross value" in s. 68 of the Rating and Valuation Act, 1925, that the said assessment was correct according to law and no question of unfairness could arise; (*b*) that as the seven other hereditaments would admittedly command rents in excess of their assessments they formed no basis for a comparison upon which Quarter Sessions could reduce the assessment of the appellants' premises; (*c*) that the appellants' remedy, if any, was to give notice to the occupiers of the seven other hereditaments objecting to their assessments.

The appellants contended (*a*) that the necessity for equality and fairness as between different hereditaments in the same valuation list had always been a principle of rating law and was clearly recognized by the Rating and Valuation Act, 1925; (*b*) that the unfairness referred to in ss. 26 and 37 of the Act of 1925 arises where one hereditament is assessed at a gross value comparatively higher than the gross values of other comparable hereditaments within the same class and affords a ground of objection notwithstanding that the gross assessment taken by itself may comply with the definition of gross value in s. 68; (*c*) that the objection of unfairness by way of comparison with other assessments the correctness of which was not disputed by the objector was altogether distinct from the objection that other hereditaments were under-assessed, which was the only case in which notice to the other occupiers was required; (*d*) that it was the duty of the rating authority, not of the individual ratepayer, to secure uniformity, and that the assessments of the seven other hereditaments not having been the subject of proposals for amendment by the rating authority must be taken to have been correctly arrived at and conclusively determined, and that the rents which such hereditaments might command was a matter irrelevant to a comparison as between one assessment and another.

Quarter Sessions were of opinion that the appellants' contentions were well founded, and in the absence of any evidence to the contrary Quarter Sessions were satisfied on the facts that the premises under appeal were unfairly assessed, and accordingly the appeal was allowed with costs and the appellants' figures of 225*l.* and 184*l.* for the gross and rateable values respectively were accepted and the valuation list was ordered to be amended accordingly.

The question for the opinion of the Court was whether upon the facts stated Quarter Sessions came to a correct determination in point of law.

The Divisional Court reversed the decision of Quarter Sessions. The fact that certain other hereditaments in the same area were assessed at sums below the rents which could be obtained therefor was no ground for the appellants' contention that the assessment of their premises, which were not assessed higher than the rent which might be expected to be obtained therefor, was unfair or incorrect.

The appellants appealed.

F. J. Tucker and *Scott Henderson* for the appellants. Uniformity and equality are vital in the rating of hereditaments in an area. By s. 2, sub-s. 3, of the Rating and Valuation Act, 1925, it is provided that "every general rate shall be a rate at a uniform amount per pound on the rateable value of each hereditament in the rating area." Sect. 18, sub-s. 2, requires the valuation committee to take steps for "promoting uniformity in the principles and practice of valuation." Sect. 26, sub-s. 1, enables any person "aggrieved by the incorrectness or unfairness of any matter in the draft list" to lodge an objection; and sub-s. 2 of that section implies that, except in the case therein mentioned, disparity is a matter in respect of which a person may be aggrieved. Sect. 37, sub-s. 1, enables a person aggrieved by any "incorrectness or unfairness" to make a proposal for the amendment of the list. These sections therefore entitle the appellants to object to the unfairness and incorrectness of the assessment of their hereditament.

[SCRUTTON L.J. Is it permissible for a person to point to one house and say: "My house is exactly like that house, but is rated higher and therefore I am entitled to have my assessment reduced"?]

Yes. The rating authority might say that the other house is rated too low and proceed to alter its valuation. The rating authority has the remedy in its own hands. Here there is no finding that the seven other hereditaments have been incorrectly assessed. This case falls within the principle of *Double* v. *Southampton Assessment Committee.* (1) There the Assessment Committee decided to reassess properties of a certain description, and they reassessed some of them, including the hereditament occupied by Double, and deposited a new valuation list in which the assessments of Double's hereditament and 127 others were increased. As regards 327 other hereditaments the reassessment of them had not been completed, and they remained at their old assessment when the rate was made. When subsequently the reassessment of the 327 hereditaments was completed their assessments were also increased, showing that at the date of the rate they had been under assessed. The Divisional Court held that the assessment was unequal and unfair and that Double was a person aggrieved. In that case Lord Trevethin C.J. said that the Assessment Committee "have no discretion . . . . to discriminate between two properties of the same character and to impose a higher rate upon the one than upon the other." That, however, is precisely what the Assessment Committee in this case has done. Whether there has been inequality or unfairness must be a question of fact: here Quarter Sessions found that there was both inequality and unfairness.

[They also referred to *Poplar Assessment Committee* v. *Roberts* (2) and *Pointer* v. *Norwich Assessment Committee.* (3)]

Comyns Carr K.C. and *Trustram Eve* for the respondents. Assuming that the appellants have a grievance, they have chosen the wrong remedy. *Pointer's* case (3) decided that an occupier by merely giving evidence that the assessment of his neighbour's similar hereditament is lower than that of his own, is not entitled to have the assessment of his own reduced to that of his neighbour's when the fact is that the

(1) [1922] 2 K. B. 213.
(2) [1922] A. C. 93.
(3) [1922] 2 K. B. 471.

latter is under assessed. If he complains that the assessment of his neighbour's hereditament is too low, his remedy is to give notice under s. 6 of the Poor Rate Act, 1801; it is otherwise when he complains that the whole system of the assessment is wrong: *Stirk & Sons* v. *Halifax Assessment Committee* (1) and *Hunter* v. *Swindon Assessment Committee.* (2) *Double* v. *Southampton Assessment Committee* (3), which is relied upon by the appellants, is clearly distinguishable: it is no authority for the proposition that an incorrect figure should be inserted; that was never suggested in that case. If an incorrect figure were inserted the rating authority and the Assessment Committee would not be carrying out the instructions of the Act.

[They also cited *Cardiff Archdiocese Trustees* v. *Pontypridd Assessment Committee.* (4)]

Tucker in reply. No evidence was given by the Assessment Committee before Quarter Sessions as to the other hereditaments, and Quarter Sessions have found unfairness in fact.

Cur. adv. vult.

June 13. The following judgments were read:—

SCRUTTON L.J. This appeal by a ratepayer against a decision of the Divisional Court varying his assessment to his prejudice is said to raise questions of procedure which have been the subject of considerable controversy in Assessment Committees and Quarter Sessions. A new building was erected in the borough of Ealing. In accordance with the procedure imposed by the Rating and Valuation Act, 1925, the rating authority made a proposal to the Assessment Committee to assess the new building at a gross value of 325*l.* Thereupon the occupier objected to the proposal on the ground that the gross value was too high and should be 225*l.* He supported his objection by a statement that seven comparable hereditaments in the borough were rated at a smaller sum than 325*l.* He did not object to, or seek to alter, the valuation of these seven

(1) [1922] 1 K. B. 264.
(2) [1922] 2 K. B. 630.
(3) [1922] 2 K. B. 213.
(4) (1930) 94 J. P. 246.

hereditaments, but proposed to use these valuations as evidence that the proposed valuation of his hereditament was "excessive and unfair." The Assessment Committee decided against his objection, and inserted a gross value of 325*l.* in the valuation list. The ratepayer then appealed to Quarter Sessions on the ground that the gross value, as fixed by the Assessment Committee, was "incorrect and unfair in comparison with the assessments of shop property appearing in the list," and he mentioned four specific shops, increased at the hearing to seven shops. Quarter Sessions heard evidence for the appellant; the Assessment Committee, in order to raise questions of principle, called no evidence. Quarter Sessions allowed the appeal, and reduced the gross value to 225*l.*, but stated a special case. On the special case coming before the Divisional Court they decided in favour of the Assessment Committee, and restored the gross value of 325*l.* The ratepayer now appeals against this decision, asking to have the decision of Quarter Sessions restored.

The Rating and Valuation Act, 1925, contains, in ss. 22 and 68, instructions as to how the gross value of a hereditament, from which the rateable value is calculated, is to be ascertained. "Gross value" is to mean: "The rent at which a hereditament might reasonably be expected to let from year to year if the tenant undertook to pay all usual tenant's rates and taxes, and tithe rent-charge, if any, and if the landlord undertook to bear the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent." An imaginary being, called a "hypothetical tenant," is contemplated, who may be owner of premises which cannot be legally let, but which yet he is supposed to be contemplating paying rent for as a tenant. He is far removed from reality; if he is dealing with premises the subject of the Rent Restrictions Act, he knows nothing about the standard rent which alone the landlord can require: *Poplar Assessment Committee* v. *Roberts* (1), though, oddly enough, if he is contemplating occupying a property for the use of which he can only take dues limited by statute, he does

(1) [1922] A. C. 93.

base his hypothetical rent on those dues: *Port of London Authority* v. *Orsett Union.* (1) It is not the actual rent which the actual occupier is paying, but the hypothetical rent which the hypothetical tenant "might reasonably be expected to pay" which is the standard of valuation.

Now on this fact, which is made by the statute the vital fact in the case, the evidence was all one way. Only one witness was called, and he said that the rent which might be expected to be paid for the premises on the terms of a letting from year to year if the tenant undertook to pay all usual tenant's rates and taxes and tithe rentcharge, if any, and if the landlord undertook to bear the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in the state to command that rent, was "at least 325*l.*" These terms are those on which the statute says "gross value" is to be calculated.

One would have thought that this evidence destroyed the ratepayer's objection, but he said: "No, I will show you that seven other hereditaments in the borough are assessed at sums lower than the rents which their hypothetical tenants would pay, and I require that I also should be assessed at a sum lower than the hypothetical tenant would pay. I do this because the essence of rating is fairness and uniformity, and I prefer my assessment to be inaccurate but uniform rather than it should be accurate but out of harmony with my neighbours. It is true that I can, if my facts are right, secure uniformity by correcting the inaccuracy of my neighbours' assessments, on objection to those assessments, and can get those assessments made uniform with my correct assessment. But I do not want this; I want to indulge my passion for uniformity by securing uniform inaccuracy, though that uniformity makes my correct assessment incorrect, but the inaccuracy is to my pecuniary advantage." As I said during the argument, this looks all wrong, and I think it is a wrong view.

It is a vital principle of the law of rating that each hereditament should be independently assessed. When, in *Stirk &*

(1) [1920] A. C. 273.

Sons v. *Halifax Assessment Committee* (1), the Assessment Committee passed a resolution that all the valuations of certain particular classes of property should be increased by 25 per cent., the list was quashed on the ground that there had been no real valuation of any particular hereditament, but only the insertion of what Sankey J. calls (2) " a fancy figure," " an arbitrary rule of thumb [applied] to every property without considering either the situation of the property, its character or age." If, then, the Assessment Committee is to begin with an independent valuation of the particular hereditament, the position of that hereditament in regard to the test of gross value imposed by the statute is the first question to be considered, and if the only evidence before the Court, and given by the occupier of the hereditament, is that 325*l.* is the rent which the hypothetical tenant would be expected to pay for a tenancy of that hereditament in statutory terms, there is an end of the case. But it may be that, regarding the hereditament in question alone, the Assessment Committee is in doubt as to the hypothetical statutory rent. In such a case it is admissible to tender evidence of the assessment of another hereditament said to be comparable, and to do so without asking, in the alternative, that such second assessment should be varied, and therefore without giving notice to the occupier of the second hereditament: see *Pointer* v. *Norwich Assessment Committee* (3) and *Hunter* v. *Swindon Assessment Committee.* (4) But while such evidence is admissible in chief, it is generally of very little value. Bankes L.J. gives the reason in *Pointer's* case (5): " With regard to the first objection, that as to the admissibility of the evidence, Salter J. in his judgment in the Court below, speaking of rents actually paid for similar premises in the neighbourhood, said: ' Certainly it has been the practice both in rating Courts and in compensation Courts to discourage evidence of this kind where it is tendered in chief,' and in that respect my experience has agreed with that of the

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(1) [1922] 1 K. B. 264.
(2) Ibid. 273.
(3) [1922] 2 K. B. 471.
(4) [1922] 2 K. B. 630.
(5) [1922] 2 K. B. 476.

C. A.
1932

Ladies Hosiery and Underwear, Ld. v. West Middlesex Assessment Committee.

Scrutton L.J.

learned judge. But the reason why it has been discouraged is not because it is inadmissible, but because there are so many circumstances to be taken into consideration that comparisons of that kind are practically valueless. And if evidence of the actual rent paid for the premises sought to be compared is valueless, much more so must be evidence as to their rateable value. But although evidence of the rateable value of such other premises is in the majority of cases of but little value, I agree with the Deputy Recorder and the Divisional Court that it cannot as matter of law be regarded as inadmissible."

While, therefore, the Assessment Committee and Quarter Sessions cannot exclude such evidence, it is not of much weight, and especially of practically no weight when they have direct and uncontradicted evidence as to the hypothetical statutory rent of the hereditament to be assessed.

The appellants here, however, say that besides the principle of independent valuation, there is another vital principle: that as between different classes of hereditaments, and as between different hereditaments in the same class, the valuation should be fair and equal. I agree, but in my view there is a third important qualification, that the assessing authority should not sacrifice correctness to ensure uniformity, but, if possible, obtain uniformity by correcting inaccuracies rather than by making an inaccurate assessment in order to secure uniform error.

That a list may be quashed where two different principles have been applied without individual justification appears from the second point decided in *Stirk's* case (1), where the assessments of certain classes of hereditaments were raised uniformly by 25 per cent., while certain other classes of hereditaments were left untouched, and also from *Double* v. *Southampton Assessment Committee* (2), where a valuation of individual hereditaments of a particular class had been commenced, but not completed, and a supplemental list, containing the new completed valuations, was issued, leaving all the hereditaments whose valuations had not been

(1) [1922] 1 K. B. 264.

(2) [1922] 2 K. B. 213.

completed at their old valuations. There the Court altered the assessment of the objector; they might have quashed the list, for it proceeded on two different principles, and, without differentiating in individual cases on the merits, assessed those hereditaments, which had been revalued on the new valuation, and those which had not been revalued on the old valuation, there being no distinction between the two classes except time of valuation, which was irrelevant to the real hypothetical gross value.

Quarter Sessions in the present case appear to have found that seven hereditaments of the same class were valued at less than the statutory standard of gross value, and that therefore an accurate valuation under the statute should be altered to make it conform with inaccurate valuations of the seven under the statute, thus making itself, when altered, inaccurate.

Quarter Sessions have stated their opinion thus: "We are of opinion that the contentions of the appellants were well founded, and in the absence of any evidence to the contrary we were satisfied on the facts that the premises under appeal were unfairly assessed, and we accordingly allowed the appeal with costs and accepted the appellants' figures of 225*l.* and 184*l.* for the gross and rateable values respectively, and ordered the valuation list to be amended accordingly." I do not understand this. The Sessions had direct and uncontradicted evidence from the appellants that the hereditament, the subject of the assessment, was correctly assessed at 325*l.* according to the statute; they had also uncontradicted evidence, and so found, that seven other hereditaments had been incorrectly assessed according to the statute at less than the hypothetical and statutory gross value. They could not correct the inaccuracies in the seven assessments, and so secure correct uniformity, because the appellants had given no notice to the seven occupiers and did not ask that their assessments should be corrected, which would have secured correct uniformity. In these circumstances, in my opinion, Quarter Sessions were not justified in disregarding the uncontradicted evidence that the assessment was a correct statement of the gross value according to the statutory definition, and altering it to an incorrect statement in order to secure uniformity in error.

It is quite impossible to do as we were requested, and give a code of instructions to Assessment Committees and Quarter Sessions which will guide them in all cases which may arise. My imagination is not equal to foreseeing all the combinations of facts which may occur in the whole country. All the help I can give is to point out that the first vital question is the correct valuation according to the statute of the individual hereditament. Where the evidence on this point is clear and uncontradicted, evidence that another hereditament has been incorrectly valued according to the statute is of no weight, unless for the purpose, on proper notice, of correcting that particular inaccuracy. Where the evidence as to the proper valuation of the particular hereditament is doubtful, evidence as to the assessment of other hereditaments may be of some weight, though as it will involve another investigation whether the assessment of the other hereditament is correct and whether the two hereditaments are comparable, it is of much less value than the direct evidence as to the hereditament whose assessment is in question. Evidence, however, as to the application of different principles of assessment, as between comparable classes, or different parts of the same classes, may, of course, be of importance on the question whether the valuation list is fair and uniform.

In the present case, however, where the only direct evidence as to the assessment of the premises under dispute was given by the appellants to the effect that the assessment was correct under the statute, the figure of gross value of 325*l.* being the correct hypothetical rent under the statute, it appears to me obvious that the decision of Quarter Sessions altering that assessment was erroneous. The appeal must therefore be dismissed with costs.

Slesser L.J. This is a case which arises in connection with the rating of a hereditament which has come into the valuation list since the last quinquennial valuation. In order to assess the hereditament it was necessary to revise the current list by including it in accordance with s. 37 of the Rating and Valuation Act, 1925.

The procedure in such a case is that the local authority makes a proposal for any necessary amendment of the list, and a person objecting to such a proposal may give notice in writing of objection thereto. Thereafter, so far as is here material, the matter is considered as if it were a contested matter in the compilation of a valuation list.

The West Middlesex Assessment Committee accepted a proposal of Ealing Borough Council, as the rating authority, dated September 21, 1929, for the amendment of the current valuation list by the insertion of the sum of 325*l.* as a gross valuation of a hereditament forming part of newly erected premises in Ealing. The occupiers appealed to Quarter Sessions on the ground that their premises were incorrectly and unfairly assessed in comparison with the assessment of other hereditaments of the same class in the same valuation list. Quarter Sessions were of opinion that their contentions were well founded, and, in the absence of any evidence to the contrary, were satisfied on the facts that the premises under appeal were unfairly assessed; and, accordingly, they allowed the appeal and accepted the appellants' figure of 225*l.* instead of 325*l.* fixed by the Assessment Committee for the gross valuation.

It is clear, from the case stated, that the appellants agree that their hypothetical rent would be at least 325*l.* ascertained upon the terms contained in the definition of "gross value" contained in s. 68, sub-s. 1, of the 1925 Act, and it is clear, apart from all considerations of incorrect and unfair assessment, that the Assessment Committee were entitled, and indeed bound, on the admission of the appellants as to their gross value, to assess them on the gross value of at least 325*l.* in accordance with s. 22 of the 1925 Act, as applied by the Rating and Valuation Act (Form of Valuation List) Rules, 1926 (Statutory Rules and Orders 1926, No. 796), and the Schedule to those Rules, which Rules contain, among other matters, in para. 7, this entry: "Gross valuation where required to be entered."

Thus, prima facie, any gross valuation other than 325*l.* could not be arrived at consistently with the requirements of the statute and the Rules, unless there be some overriding provision which entitles the Assessment Committee, or some other authority to whom appeal is brought, to say, notwithstanding that the gross valuation has been ascertained at 325*l.*, it is to be reduced to 225*l.* The appellants recognize this difficulty, but seek to overcome it in the following way: before Quarter Sessions they adduced evidence that there were seven other hereditaments found to be comparable with and forming part of the same class as their premises, which were assessed on a lower basis. They argue, therefore, that they suffered from " unfairness " within the meanings of ss. 26 and 37 of the 1925 Act, in that they were assessed by the Assessment Committee on a higher rate than the seven other hereditaments with which they were comparable and of which they formed the same class. As to s. 26, sub-s. 2, it provides that a person shall not be deemed to be aggrieved in respect of the valuation of any hereditament in one of those parts of a rating area by reason of any disparity between the valuation of that hereditament and the valuation of any hereditament situated in a part of the area the new valuation list for which is to be made in a subsequent year. The appellants argue that this sub-section indicates that, apart from the particular matters there provided, a disparity may constitute a grievance under sub-s. 1 of s. 26 as being an incorrectness or unfairness of any matter in the draft list. And as to s. 37, sub-s. 1, that sub-section states that any person who is aggrieved by the incorrectness or unfairness of any matter in the valuation list may make a proposal for the amendment of the list. They argue that, by being assessed at a rate different from other premises of the same class, they are suffering from incorrectness or unfairness, and support their request to be reduced to 225*l.* for this reason.

I do not think that, in any view, it is possible for the appellants to say that they can complain of " incorrectness," for they themselves have admitted the correctness of their assessment. But with regard to " unfairness," a more difficult question arises. They rely upon *Double* v. *Southampton*

Assessment Committee. (1) In that case, the Assessment Committee resolved that a certain class of property—namely, licensed houses, breweries, places of amusement and water-side properties—should be reassessed. By March 17, 1920, 127 houses had been revalued and their value increased. The remaining 327 licensed houses had not as yet been revalued. On that date the Assessment Committee resolved to include in a supplemental valuation list the houses already assessed, which they confirmed and on which they passed a poor rate. Thus the 127 houses were, for a time, rated on a higher basis than the 327, and one of the occupiers complained, saying that the rate was unfair, and in the High Court succeeded, the decision of the Quarter Sessions to the same effect being confirmed. It is said that *Double's* case (1) is an authority for declaring that an inequality of treatment is a ground for the assessment being unfair. Lord Trevethin C.J. states (2) that it is a principle of the law of rating that all properties of the same class must be valued by the same method of assessment. In that case, as the revision had only been partial, different methods of assessment had been applied at the time of complaint to the class of 127 as distinguished from the class of 327 houses. To that extent, in so far as *Double's* case (1) was dealing with general methods of assessment, it was argued that a distinction can be drawn between that case and the case where an individual occupier is complaining of a difference of treatment of one hereditament from several others. In that case, on the old assessment, Double was rightly assessed; the question really turned upon the right time from when the new assessment should operate on a part of the class assessed. It was held that the charge should be made so as to operate over the whole class and not a part. I cannot read *Double's* case (1) to decide more than this.

I am inclined, on consideration, to agree that the requirements of the statute do, in their recognition of unfairness, produce the result that an occupier is entitled to require that all other occupiers of the same comparable class shall be assessed upon a similar basis, and, in so far as the seven other

(1) [1922] 2 K. B. 213.
(2) [1922] 2 K. B. 224.

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LADIES HOSIERY AND UNDERWEAR, LD. v. WEST MIDDLESEX ASSESSMENT COMMITTEE.

Slesser L.J.

hereditaments in this case of the same class are differently assessed, I think that the appellants here may possibly say that their assessment is unfair.

This, however, by no means disposes of the matter. Their assessment is correct, and the unfairness, if it exists, is solely due to the under-assessment of the other hereditaments of the same class. The only method by which the apparent unfairness could be corrected would be for the appellants to give notice to the seven other hereditaments concerned, and then apply under s. 37 to have them raised up to the level of the appellants. This, of course, the appellants have not done, and do not seek to do. In the special case it is stated that the appellants "did not seek to prove or contend that the seven other hereditaments were under-assessed, but accepted their assessments as correct." It is scarcely possible, if the appellants' assessment is correct, that the seven other hereditaments can both be in the same class as the appellants and comparable with them, and at the same time that they should be correct at the present time, although they may have been correct at the time of the last quinquennial valuation.

However that may be, it is clear to my mind that the appellants have taken the wrong course in attempting to correct their grievance of unfairness. If the grievance be, as it may well be, that there is economic inequality in requiring competing businesses to pay less proportionately than the appellants, that inequality can only be removed by increasing the assessments of their competitors. But I find it quite impossible to hold that the mandatory requirements of the Rating and Valuation Act as to the assessment of gross value in a particular case can be avoided or modified by a consideration of unfairness.

The decision of the Divisional Court in this case follows in principle the decision in *Cardiff Archdiocese Trustees* v. *Pontypridd Assessment Committee* (1), so far as the question of unfairness was there considered, and, in my opinion, as was there pointed out by the Lord Chief Justice, the argument that, because some are unfairly treated, the Act must be

(1) 94 J. P. 246.

universally misapplied, may well be rejected in the present appeal as it was in the appeal in that case. I agree that this appeal must be dismissed.

EVE J. The appellants, Ladies Hosiery and Underwear, Ld., are the occupiers of the ground floor of No. 5 Church Parade, Ealing, used as a shop, rated as a separate hereditament, and forming part of a newly erected building.

On March 10, 1930, the respondents accepted a proposal, dated September 21, 1929, of Ealing Borough Council as the rating authority, for the amendment of the current valuation list by the insertion therein of the figure 325*l.* as the gross value of the hereditament occupied by the appellants.

The appellants appealed from that decision to Quarter Sessions, and on February 16, 1931, Quarter Sessions allowed the appeal and ordered the valuation list to be amended by the insertion of 225*l.* as the gross value of the said hereditament, subject to a case stated under s. 31 of the Rating and Valuation Act, 1925, for the opinion of the Court upon the question whether, upon the facts as therein stated, they came to a correct determination and decision in point of law.

On April 7, 1932, the Divisional Court reversed the judgment of the Court of Quarter Sessions, with costs, and directed that Court to enter judgment for the respondents with costs.

Leave to appeal to this Court was asked and given, and the question is whether, upon the facts found, the appellants are entitled to the relief they claim in these proceedings. Their complaint is that their premises are incorrectly and unfairly assessed in comparison with other hereditaments of the same class in the same valuation list; and they have specified certain hereditaments in the same neighbourhood with the assessments of which they claim to compare their own assessment for the purpose of establishing such incorrectness and unfairness. No notice has been given to the occupier of any of the alleged comparable hereditaments, nor did the appellants contend, or seek to prove, that any of them were underassessed. They accepted the assessment as correct, and themselves called a witness to prove that their own premises were in fact let on a full repairing lease at 425*l.* per annum, and that their gross value was 325*l.* at the least.

Upon these materials the following facts are found in the case: that the other hereditaments, seven in number, were comparable with and formed part of the same class as the appellants' premises, that these latter were assessed on a comparatively higher basis than the seven other hereditaments, and that the seven other hereditaments were assessed at sums below the rents which could be obtained therefor.

Standing by themselves, the findings that the seven other hereditaments were comparable with and formed part of the same class as the premises under appeal, and that the appellants' premises were assessed on a comparatively higher basis than the seven other hereditaments, may point to either of two alternatives, the one that the appellants' premises are over-assessed, and the other that the comparable premises are under-assessed, but when they are accompanied by a finding that the comparable hereditaments were assessed at rents below those which could be obtained therefor, and when the appellants have themselves proved that the gross assessment of their own hereditament is correct, it is impossible to arrive at any other conclusion than this, that the want of uniformity—if it really exists—cannot be due to over-assessment of the appellants' hereditament.

The one concrete fact which emerges is the correctness of the assessment of the appellants' premises, and when that is once recognized as established, there is really nothing more to be said. It is quite impossible for the Court, in these proceedings, to substitute for the correct figure another figure which, by their own evidence, they have proved to be inaccurate.

It may be that want of uniformity, and consequent unfairness, can be established, and that it is due to under-assessment of comparable premises and not to other considerations affecting these particular premises; but, if so, this must be established by proper proceedings directed to the raising of the assessments of those other premises, and so framed as to afford the occupiers thereof an opportunity of showing that no such unfairness in fact exists. Upon the materials now before the Court it is impossible to arrive at any conclusion beyond this, that the appellants have failed altogether to prove that their assessment is otherwise than correct.

I think, for the reasons given by my Lord and the Lord Chief Justice in the Divisional Court, that *Double's* case (1) has no application to the facts of this case, and accordingly I agree that this appeal must be dismissed.

Appeal dismissed.

Solicitors for appellants: *Blundell, Baker & Co.*
Solicitor for respondents: *H. G. Greenwood.*

J. S. H.

THE KING v. LONDON JUSTICES.

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May 25.

Ex parte SHOREDITCH ASSESSMENT COMMITTEE.

Rating—Valuation—List—Appeal to Quarter Sessions—Notice not given before January 14 *or before March* 31*—Power to extend Time—"Mistake"—Valuation (Metropolis) Act,* 1869 (32 *&* 33 *Vict. c.* 67), *ss.* 34, 42, *sub-ss.* 12, 13*—Local Government Act,* 1888 (51 *&* 52 *Vict. c.* 41), *s.* 42, *sub-s.* 10.

The time fixed by s. 42, sub-s. 13, of the Valuation (Metropolis) Act, 1869, for the hearing of appeals is imperative and not merely directory. Therefore, the jurisdiction conferred on justices by s. 34 to order notice of appeal to be given after the date, January 14, specified in s. 42, sub-s. 12, in an appropriate year only enables that to be done where the notice can be given in time for the hearing of the appeal before the ensuing March 31, as provided by s. 42, sub-s. 13.

Dicta of Lord Esher M.R. and Bowen L.J. in *Reg.* v. *London Justices and London County Council* [1893] 2 Q. B. 476, 488, 493 applied.

RULES NISI for certiorari and prohibition.

In March, 1929, Lipton, Ld., a trading company, which at all material times was the occupier of premises known as 112/122 Tabernacle Street, in the borough of Shoreditch, made a claim under the Rating and Valuation (Apportionment) Act, 1928, Sch. I., that the premises should be included

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(1) [1922] 2 K. B. 213.

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as an industrial hereditament in the special list prepared under that Act by the Shoreditch rating authority. The claim was resisted, objection being made by the rating authority and the Revenue Officer, and on September 11, 1929, the assessment committee decided against the claim. Lipton, Ld., appealed to the County of London Quarter Sessions, which dismissed the appeal, but stated a case for the opinion of the High Court. The matter came before the High Court on April 23, 1931, when the Court decided in favour of Lipton, Ld., and reversed the decision of quarter sessions. The decision of the High Court was affirmed by the Court of Appeal on June 9, 1931.

Meanwhile, on May 24, 1930, Lipton, Ld., had received from the rating authority a notice of a new assessment which had been made in respect of the premises for the new quinquennial valuation list to come into force on April 6, 1931. The premises were not shown in the proposed quinquennial list as being an industrial hereditament. Lipton, Ld., however, assumed that, if their appeal to the High Court, which was then pending, was decided in their favour, the valuation list would be automatically corrected, and entered no objection to the list on the ground that the premises, as a whole, were an industrial hereditament. The only objection they took was that part of the premises was clearly to be treated as an industrial hereditament. That objection was considered and rejected by the assessment committee on September 25, 1930. Lipton, Ld., did not give notice of appeal to quarter sessions against that decision before January 14, 1931, as specified by s. 42, sub-s. 12, of the Valuation (Metropolis) Act, 1869. (1) The quinquennial list duly came into force on April 6, 1931.

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(1) By the Valuation (Metropolis) Act, 1869, s. 34: "The justices in special sessions and in assessment sessions respectively . . . . if from accident or mistake due notice of appeal has not been given . . . . may, if they think it just, order notice of appeal to be given. . . . ."

Sect. 42, sub-s. 12: "Notices of appeals to assessment sessions shall be given on or before January 14 in the same year."

Sub-s. 13: "The justices may hold the assessment sessions at any time after February 1 in the same year, which will enable them to

In pursuance of the decisions of the High Court and the Court of Appeal the special list was amended and the rating authority repaid to Lipton, Ld., 1282*l.* 10*s.*, the amount of the rates overpaid by them in respect of the premises for the period from October 1, 1929, to April 6, 1931. When, however, Lipton, Ld., asked for a notification that the premises had been placed in the quinquennial list as from April 6, 1931, at the figure applicable to them as an industrial hereditament, the rating authority informed them that they had no authority to alter or amend the list.

Lipton, Ld., then gave notice to the assessment committee of their intention to move quarter sessions for an order giving them leave to enter an appeal against the decision of the assessment committee of September 25, 1930. The motion was heard on December 9, 1931, when the quarter sessions took the view that Lipton, Ld., had not given due notice of appeal against the order of September 25, 1930, because of a "mistake" within the meaning of s. 34 of the Valuation (Metropolis) Act, 1869, and that that section, with s. 42, sub-s. 10, of the Local Government Act, 1888, gave quarter sessions power to order notice of appeal to be given although the time specified in s. 42, sub-s. 12, of the Act had expired. An order was accordingly made that an appeal be entered and heard in due course.

On January 19, 1932, the Shoreditch Assessment Committee obtained a rule nisi calling on the justices for the County of London to show cause why a writ of certiorari should not issue directing them to remove into the High Court the order made by them on December 9, 1931, and also a further rule nisi calling on the justices to show cause why a writ of prohibition should not be awarded to prohibit

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determine all appeals . . . . before the ensuing March 31."

Sect. 4: "In this Act . . . . the term 'year' means the twelve months commencing with April 6 and ending with the succeeding April 5. . . . ."

By the Local Government Act, 1888, s. 42, sub-s. 10: "The quarter sessions for the county of London shall be substituted for the general assessment sessions under the Valuation (Metropolis) Act, 1869, and have all the jurisdiction vested in those sessions. . . . ."

them from proceeding further with the hearing of the appeal by Lipton, Ld.

Jardine K.C. and *C. P. Harvey* showing cause against the rule. The rule should be discharged. It is said that what has happened here offends against the limitation of time laid down in s. 42, sub-ss. 12 and 13, of the Valuation (Metropolis) Act, 1869, but those sub-sections must be read as subject to the provisions of s. 34 of the Act, which empowers the justices to order notice of appeal to be given if, from accident or mistake, notice has not been given within the proper time. Here there was a mistake of law as to what would be the effect of a decision in favour of Lipton, Ld., by the High Court or the Court of Appeal, that mistake being due to a misconception of the effect of para. 8 of Sch. I. to the Rating and Valuation (Apportionment) Act, 1928, and s. 68 of the Local Government Act, 1929: see per Cozens-Hardy M.R. in *Roles* v. *Pascall & Sons.* (1) If in such circumstances as these the words of s. 34 do not give power to the justices to do what they have done here, they are meaningless. The provisions of s. 42 are directory, not mandatory: *Reg.* v. *Ingall.* (2) In *Reg.* v. *London Justices and London County Council* (3) and *Rex* v. *London Justices. Ex parte Locke, Lancaster and W. W. & R. Johnson & Sons, Ld.* (4), appeals could not be heard before March 31 owing to a glut of business in the courts, and it was held that the justices could hear the appeals after March 31. Here Lipton, Ld., who have made an honest mistake, are no more in default than the parties there and, on the principle applied in those cases, their appeal should also be heard.

Hubert Hull and *Ifor Lloyd* in support of the rule. Quarter sessions had no jurisdiction to hear this appeal. The provisions of s. 42, sub-s. 13, of the Act of 1869 are imperative, not mandatory: per Lord Esher M.R. in *Reg.* v. *London Justices and London County Council* (3); approved in *Rex* v. *London Justices. Ex parte Locke, Lancaster and*

(1) [1911] 1 K. B. 982, 985.
(2) (1876) 2 Q. B. D. 199.
(3) [1893] 2 Q. B. 476.
(4) [1929] 1 K. B. 81.

W. W. & R. Johnson & Sons, Ld. (1) The position as a result of those cases is that an appeal must be heard before March 31, except where a glut of business in the court prevents such a hearing. Where in the sub-section an exception is intended, in the case of a valuation or a valuation list being ordered, it is expressly provided. It is impossible to imply in s. 42, sub-s. 13, an exception contained in s. 34. The true meaning of s. 34 and s. 42, sub-ss. 13 and 14, read together, is that the justices may extend the time for giving notice of appeal, provided that the provisions of s. 42, sub-s. 13, are not infringed. It is further submitted that what happened here was not a mistake within s. 34.

LORD HEWART C.J. The first ground on which these writs are sought is that, by reason of the provisions of s. 42, sub-ss. 12 and 13, of the Valuation (Metropolis) Act, 1869, the respondent justices had no jurisdiction to give to Lipton, Ld., leave to enter an appeal.

Sect. 42, sub-s. 12, provides that notice of appeal to assessment sessions must be given before January 14 in the appropriate year. By sub-s. 13 the justices may hold assessment sessions at any time after February 1 in the same year which will enable them to determine all appeals before the ensuing March 31. Mr. Jardine has argued that that date, March 31, is indefinitely extended by the provision in s. 34 of the Act that justices in assessment sessions may order notice of appeal to be given if, from accident or mistake, due notice of appeal has not been given. It is important to see what that provision is and where it appears. The section provides that the justices may adjourn the hearing from time to time to any day not later than the day before which all appeals to them are required to be heard, and, in the case of assessment sessions, for the purpose of obtaining the decision of any superior court, to any day necessary for that purpose, and if, from accident or mistake, due notice of appeal has not been given, or if an additional notice of appeal appears to be required,

(1) [1929] 1 K. B. 81.

they may order notice of appeal to be given. It is important to observe that those last words appear as part of the general provisions of s. 34, and I think that Mr. Hull is right in arguing that, although there is power in a proper case to order notice of appeal to be given after January 14, there is no power to order notice of appeal to be given after March 31.

Our attention has been directed to various cases, to two of which I will refer. In *Reg.* v. *London Justices and London County Council* Lord Esher M.R. said plainly that the provisions as to time in this Act were imperative. (1) Bowen L.J. also said (2): "It seems to me, therefore, that reason and sense drive one to find, if we can, an exception from the imperative language of the Act (which is intended to be imperative as regards the voluntary action of the parties, and of the Courts) where the block of business is such, or such events happen, that the Court cannot conclude its business before March 31. Were this otherwise, a pertinacious advocate who chose to argue for three days might destroy the right of appeal of someone else. It seems to me that although the Court of Assessment Sessions is bound to exercise its own discretion as to fixing dates for appeals, as to regulating adjournments, and as to hearing cases, so as, if possible, to finish before March 31, and although the parties are bound to lodge their appeals within the statutory periods given by the Act of Parliament, nevertheless, if by necessity or default of the Court itself, whether culpable or not, the time has passed, the Court continues clothed with authority to do justice, which, if it were not done by the Court, cannot be done at all." The underlying principle there is that the parties are bound to lodge their appeals within the statutory time, and, hard as this case may be, I think that the matter is concluded by those judgments in the Court of Appeal. That case was referred to in *Rex* v. *London Justices. Ex parte Locke, Lancaster and W. W. & R. Johnson & Sons, Ld.* (3), and all the members of the Court in that case were of the opinion that the law must be taken to be as it was stated by Lord Esher M.R. I think, therefore, that the first ground is made out and that, by reason of the provisions of s. 42, sub-ss. 12 and 13, of the Act of 1869, the respondent justices have no jurisdiction to consider these appeals.

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(1) [1893] 2 Q. B. 476, 488.
(2) [1893] 2 Q. B. 493.
(3) [1929] 1 K. B. 81.

We have heard much argument about whether what happened here was a "mistake" within s. 34. I am not at all satisfied that it was, but, even if it were, I do not think that s. 34 gives such an extension to the times prescribed by s. 42 as to justify the respondent justices in giving Lipton, Ld., leave to serve notice of appeal, as they did in this case. I think, therefore, that these writs should be made absolute.

AVORY J. I am of the same opinion. Without expressing any opinion on the question whether there was a "mistake" within s. 34, I am satisfied that the jurisdiction conferred on the justices by s. 34 to allow notice of appeal to be given after January 14 only enables that to be done where the notice can be given in time for the hearing of the appeal by March 31.

I think that the first case to which my Lord has referred is a distinct authority that, so far as the parties are concerned, the time fixed for the hearing of appeals is imperative, and that the parties cannot, by their own default, whether it be by mistake or otherwise, put the court in the position of not being able to hear the appeal by the appointed day, March 31. It is clear that, in the present case, Lipton, Ld., by their own action, whether it was mistake or not, did prevent the court from determining the questions raised by this appeal by March 31, 1931.

In these circumstances I agree that, on December 9, 1931, the justices had no power to give leave to Lipton, Ld., to enter an appeal and, therefore, that these rules must be made absolute.

DU PARCQ J. I agree, and I also prefer to express no opinion whether there were materials on which the justices

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could properly hold that there had been a "mistake" within the meaning of s. 34. I base my decision on the other proposition that was argued by Mr. Hull—namely, that the requirement that all appeals are to be determined before March 31 is imperative, subject, as was held in *Reg.* v. *London Justices and London County Council* (1), to any delay which is caused by a glut of business in the courts. I think that it is desirable to remember that, as Lord Esher M.R. said (2), it is imperative on the justices, just as much as it is on the parties, to do certain things within the prescribed times. If there is no glut of business preventing the justices from hearing an appeal by March 31, it is impossible to say that they are relieved from so doing because there is some mistake on the part of the parties. Other considerations might arise if the business of the sessions prevented the appeal being heard before March 31 and it was discovered after that date that due notice of appeal had not been given. Whether in such circumstances sessions would have the right to order due notice of appeal to be given and to hear the appeal is not for decision to-day.

Rules absolute.

Solicitor showing cause: *T. H. B. Bamford.*
Solicitor in support: *R. C. Ray.*

(1) [1893] 2 Q. B. 476.
(2) [1893] 2 Q. B. 488.

G. F. L. B.

YOUNG *v.* MERCHANTS' MARINE INSURANCE COMPANY, LIMITED.

C. A.
1932
June 7, 8, 20.

[1931. B. 2522.]

Insurance (Marine)—Insurance against Total Loss and Collision Liability—Running Down Clause—Cross liabilities—Reinsurance of Liability for Total Loss only—Vessel totally Lost by Collision—Both Vessels to blame equally—Payment by Insurers for Total Loss and under Running Down Clause—Claim by Reinsurer to benefit in respect of Claim under Running Down Clause.

The defendants underwrote a policy of marine insurance on the *Whimbrel* against total loss, and also by a running down clause, against three-fourths of collision liability on the principle of cross liabilities. The defendants reinsured their liability for total loss only with the plaintiff. During the currency of the policy the *Whimbrel* was sunk as the result of a collision with the *Marloch* and became a total loss. In proceedings in the Admiralty Court both vessels were held equally to blame, and, as the *Marloch's* half damages exceeded the *Whimbrel's* half damages, the *Whimbrel* had to pay the balance under the Admiralty rule of single liability. The defendants paid the owners of the *Whimbrel* for a total loss, and also a further sum under the running down clause, that sum being ascertained by bringing into account a payment treated as having been received in respect of the *Marloch's* liability for the damage done by her to the *Whimbrel*, and the payment of a larger sum in respect of the damage done by the *Whimbrel* to the *Marloch*. The plaintiff claimed that he was entitled to the benefit of the credit in respect of the *Marloch's* liability :—

Held, that the plaintiff, not being a reinsurer of the liability under the running down clause, was not entitled to the benefit of the credit mentioned.

Decision of MacKinnon J. affirmed.

APPEAL from a decision of MacKinnon J.

By a valued policy of insurance dated October 9, 1925, the defendants insured the "hull, etc., as per specification attached" of the steamship *Whimbrel*, valued at 26,000*l.*, for 1715*l.* part of the said sum of 26,000*l.* against (inter alia) total loss for a period commencing on October 1, 1925, and ending on September 30, 1926. By the same policy the defendants also insured the owners of the *Whimbrel* against three-fourths of their collision liability. Clause 1 of the Institute Time Clauses incorporated with the policy provided :

"When both vessels are to blame claims under this clause shall be settled on the principles of cross liabilities as if the owners of each vessel had been compelled to pay to the owners of the other such one-half or other proportions of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the assured in consequence of such collision."

The *Whimbrel* was also entered in a Protection and Indemnity Association as to one-fourth of any damage caused by collision to any other ship or vessel, and when both vessels were to blame claims were to be settled on the principle of cross liabilities.

By a flat policy of insurance for 34,930*l.* dated October 31, 1925, the plaintiff, with other underwriters, reinsured the defendants in respect (inter alia) of the *Whimbrel* to the extent of their whole risk—namely, 1715*l.*, and the plaintiff subscribed the said policy for one-fourth of 3123*l.* The policy was expressed as being a reinsurance of the defendants, subject to the same terms, clauses and conditions as the original policy and to pay as may be paid thereon, valuation clause as in the original, but being against the risk of total and/or constructive total loss only, from October 1, 1925, to September 30, 1926.

On February 2, 1926, the *Whimbrel* was sunk as a result of a collision with the *Marloch*, and became a total loss.

Cross-actions were instituted in the Admiralty Court by the respective owners of the two vessels, and both vessels were held equally to blame. As the *Marloch's* half damages exceeded the *Whimbrel's* half damages the latter had to pay the balance under the Admiralty rule of single liability.

A statement of division of salvage proceeds and charges, claim under the collision clause and division of collision recovery and costs for the *Whimbrel* was prepared by average adjusters; this statement showed in detail how the amounts to be paid and to be received on the policy were made up, the amount to be paid being 9559*l.* 9*s.* 3*d.*, and the amount to be received being 7764*l.* 11*s.* 7*d.*, leaving a balance to pay on the policy of 1794*l.* 17*s.* 8*d.* This claim (in addition to the total loss) was settled by the underwriters on the original policies, and their reinsuring underwriters applied for a refund in respect of (inter alia) the amount described in the adjustment as net recovery from the owners of the *Marloch*, but not actually recovered, 7760*l.* 4*s.* 10*d.*

By their defence the defendants said that the plaintiff had no risk or interest under the collision clause in the policy of October 9, 1925, and any such clause and any adjustment, settlement or recovery by or with the defendants were irrelevant as between the plaintiff and the defendants. Further, they denied that they had received 7760*l.* 4*s.* 10*d.* or any sum.

MacKinnon J. gave judgment for the defendants, holding that the sum allowed under the running down clause was only a figure of account and that the defendants' liability to pay the owners the full total loss had not been in any way diminished.

The plaintiff appealed.

Raeburn K.C. and *Martin Vaughan* for the appellant.

Le Quesne K.C. and *Sir Robert Aske* for the respondents.

Cur. adv. vult.

June 20. The following judgments were read:

Scrutton L.J. This appeal raises a question of marine insurance law which we were told has been a subject of much difference of opinion amongst underwriters and average adjusters. It arises on these facts: The steamship *Whimbrel* and the steamship *Marloch* came into collision, and in a collision action were found both to blame. The effect of this in the Admiralty Court is that the damage to each ship being ascertained, one judgment is given for the ship sustaining most damage for half the excess of her damage over the damage of the other ship. This is called "the single liability principle," and is held to be correct by the House of Lords in *Stoomvaart Maatschappy Nederland* v. *Peninsular & Oriental Steam Navigation Co.* (*The Khedive*). (1) Treating

(1) (1882) 7 App. Cas. 795.

this as the correct principle, instead of the method of treating each ship as having a claim for which it obtains judgment, has at any rate some very important consequences. When one of the ships limits her liability and the fund is insufficient to pay all claims, the other ship cannot prove on the fund for the total amount of her damage, but only for the balance of the two amounts of damage. It has this further result that, when an underwriter has paid a shipowner for the total loss of his ship and is therefore subrogated to the shipowner's legal claim in respect of the subject-matter insured (Marine Insurance Act, 1906, s. 79), he is subrogated not to a claim for his whole loss, but to a claim for half the balance of the two losses, which if his loss is the smaller will be nothing.

In the present case the *Whimbrel* was insured by the Merchants' Marine Insurance Company against total loss from marine perils, and also against third party liability from collision. This latter head, which is loss to the shipowner's pocket, not to his ship, has, since *De Vaux* v. *Salvador* (1), been held not to be a loss by perils of the sea, and is therefore covered by a separate clause known as the "running down clause." When, after the decision in *The Khedive* (2), a question arose in *London Steamship Owners' Insurance Co.* v. *Grampian Steamship Co.* (*The Balnacraig*) (3) whether, when the colliding ships were both to blame, the subsequent liabilities under the running down clause were to be treated as separate claims each ship for its own damage, or only for a balance claim by the ship having the greatest loss, and the running down clause said nothing on the subject, Mathew J. and the Court of Appeal held that the matter under the decision of *The Khedive* (2) was to be treated as one liability for the balance, and not as two liabilities or claims for the whole damage sustained by each ship. As a result of this decision a new running down clause was framed which purported expressly to establish by agreement the "principle of cross liabilities."

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(1) (1836) 4 A. & E. 420.

(2) 7 App. Cas. 795.

(3) (1889–1890) 24 Q. B. D. 32, 663.

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The next and most vital point in the case is that the Merchants' Marine Insurance Company reinsured with Lloyd's underwriters not the whole of their risk on the *Whimbrel* but only "the risk of total and/or constructive total loss." They did not reinsure the third party risk of liability covered by the running down clause, and the reinsurance policy did not therefore include that clause or say anything about "the principle of cross liabilities." The original underwriters, the Merchants' Marine, settled with the shipowner for a total loss in the sum of 1715*l.*, and the reinsurers, Lloyd's underwriters, settled for a total loss with the original underwriters for the same sum. This settlement had nothing to do with the running down clause. The original underwriters then settled a claim under the running down clause for 118*l.* 7*s.* 10*d.*, and, of course, did not claim anything from the reinsurers who had not insured this risk. But this figure was arrived at by taking the balance of the two third party liability claims, the *Whimbrel's* claim against the *Marloch*, some 7760*l.*, as compared with the *Marloch's* larger claim against the *Whimbrel*. It then occurred to those advising Lloyd's underwriters, the reinsurers of total loss only, to say: "We have paid you so many pounds for total loss of the *Whimbrel*, but you have recovered from the *Marloch* so much, 7760*l.*, for their liability for your loss. We must have credit for this as reducing our loss." The question is whether this claim of Lloyd's underwriters as plaintiffs is right. MacKinnon J. has held it is not right, and Lloyd's underwriters, the reinsurers, appeal.

I approach the matter on comparatively simple lines and do not think it necessary to make any complicated average adjustments to illustrate my view. Lloyd's underwriters have settled a total loss on hull and are, therefore, entitled to be subrogated to any legal rights the Merchants' Marine and the shipowner have in respect of hull. But the shipowner's right being to a single liability or balance judgment, and the balance being against him, there is no legal right of his against the *Marloch* to which the reinsurers can be subrogated. It is true that by reason of the running down clause and the "principle of cross liabilities" therein contained the Merchants' Marine Company have paid a further sum, obtained by treating them as having received 7760*l*. in respect of the *Marloch's* liability in respect of the damage the *Marloch* did to the *Whimbrel*, and having paid a larger sum in respect of the damage the *Marloch* has sustained from the *Whimbrel*. But Lloyd's, the reinsurers, have not reinsured liability under the running down clause and have not made any agreement applying the "principle of cross liabilities." All this is to Lloyd's res inter alios acta; they are not bound by it and cannot take advantage of it.

The case for the reinsurers is put in this way. Assume both ships to blame, and each ship to have sustained 10,000*l*. loss for which the other ship is liable. We have settled a total loss for a larger sum than 10,000*l*., but the shipowner has received 10,000*l*. in respect of that loss from the other ship, we are entitled to have the benefit of that sum by which the shipowner has lessened his loss, which we have paid him. The answer made by MacKinnon J., which I am of opinion is correct, is that the shipowner has "received" nothing. On the facts stated there will be no judgment in favour of either ship, not a judgment for each ship for 10,000*l*., so that Lloyd's can get the benefit of the judgment against the *Marloch* for 10,000*l*. The appearance of 10,000*l*. in the figures from which a balance is obtained is only due to a formula adopted by the shipowner and his underwriter in respect of a matter in which Lloyd's are not interested, by an agreement to which Lloyd's are not a party. Lloyd's, having paid a total loss, are entitled to be subrogated to any right of the shipowner in respect of loss of hull, but, as on the principle in *The Khedive* (1), the balance being against you, you have no judgment in your favour, you cannot claim the benefit of any of the figures from which the balance against you is calculated.

I only desire to mention, as MacKinnon J. does not mention it, that if the balance had been in favour of the *Whimbrel*, the reinsurers would, of course, have been entitled to reduce their loss by the amount of that balance, but not by the amount

(1) 7 App. Cas. 795.

of the claim used in computing that balance, which is only relevant to a subject-matter, and a contract, to which they are strangers.

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The appeal must be dismissed with costs.

GREER L.J. I think I can make my opinion clearer if I assume that the defendants were the sole insurers of the hull at an agreed value, and the sole insurers of the whole of the liability of the *Whimbrel* to the *Marloch*. This will make it unnecessary to state the liability of the insurers in proportions, but the principle applicable will be exactly the same as if it were so stated. For the same reason I treat the reinsurer, the plaintiff in the action, as having reinsured the whole of the defendants' liability on the insurance on the hull and machinery of the *Whimbrel*.

While insured by the defendants the *Whimbrel* came into collision with the *Marloch*, and as a result of the collision became a total loss. Cross-actions were brought in the Admiralty Court by the respective owners of the two vessels, and both vessels were declared to be equally to blame. As the *Marloch's* half damage exceeded the *Whimbrel's* half damage, the latter had to pay the balance under the Admiralty rule of single liability in accordance with the decision in *The Khedive.* (1) In the result, on the principle of single liability, the *Whimbrel* became liable to pay the owners of the *Marloch*, and did pay to them, the sum of 1794*l.* 17*s.* 8*d.* They were entitled to, and did recover, three-quarters of this sum under the running down clause in their policy with the defendants and other insurers of hull, etc., and one-fourth from their mutual insurance club. This division of insured liability is immaterial, and I treat them as having become entitled to recover the said sum of 1794*l.* 17*s.* 8*d.* from the defendants, and having been paid that sum. The defendants reinsured their liability on hull, etc., with the plaintiff, who paid them the whole of their liability on this head in respect of the total loss of the *Whimbrel*. On discovering the form of the running down clause in the *Whimbrel's* policy with the defendants, the reinsurer claimed that he had overpaid the

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(1) 7 App. Cas. 795.

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defendants by the amount of 7760*l.* 4*s.* 10*d.*, being the amount the *Whimbrel* would have been entitled to recover from the *Marloch* if that liability had been determined separately and independently of the liability of the *Marloch* to pay half the *Whimbrel's* damage.

They never in fact obtained any benefit from the Admiralty judgment, having been found liable to pay the *Marloch* the sum of 1794*l.* 17*s.* 8*d.*, which they in fact paid. They could not under the Admiralty rule be called upon to pay more than the 1794*l.* 17*s.* 8*d.*, nor could they recover any sum from the *Marloch.* They could not under their policy, construed as a whole, claim anything more than an indemnity for what they had to pay. Their right to recover from their insurers for their total loss under the insurance on hull is not affected by the fact that they had an additional right to recover the balance they had to pay to the owners of the *Marloch.* Nor could the defendants, their insurers, if subrogated to their rights, in fact recover anything more than the *Whimbrel* could, that is to say, nothing.

If the claim of the plaintiff is to be determined by the true facts of the case, it seems plain that the original insurers have in fact paid the *Whimbrel* the *Whimbrel's* total loss on the insurance on hull, and have been entitled to recover nothing against that loss by subrogation. The argument for the appellant was entirely based on the special form of the running down clause in the *Whimbrel's* policy with the defendants.

The clause is in these terms: " And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel and the assured shall in consequence thereof become liable to pay by way of damages to any other person or persons any sum or sums in respect of such collision the undersigned will pay the assured such proportion of three-fourths of such sum or sums so paid as their respective subscriptions hereto bear to the value of the ship hereby insured, provided always that their liability in respect of any one such collision shall not exceed their proportionate part of three-fourths of the value of the ship hereby insured,

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and in cases in which the liability of the ship has been contested or proceedings have been taken to limit liability, with the consent of the undersigned, they will also pay a like proportion of three-fourths of the costs which the assured shall thereby incur, or be compelled to pay; but when both vessels are to blame, then unless the liability of the owners of one or both of such vessels becomes limited by law, claims under this clause shall be settled on the principle of cross-liabilities as if the owners of each vessel had been compelled to pay to the owners of the other of such vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the assured in consequence of such collision."

I will try to do justice to the appellant's argument, though I am not sure that I understood it accurately. As I understood it, it was as follows: the liability of the insurers was by agreement to be determined by an assumed state of facts contrary to the decision of the Admiralty Court. It was to be assumed as between the owners of the *Whimbrel* and their insurers, the defendants, that the Admiralty Court had ordered the *Marloch* to pay the owners of the *Whimbrel* half the damage to the *Whimbrel*, which has been ascertained at the amount of 7760*l.* 4*s.* 10*d.*, and that the owners of the *Whimbrel* had to pay the owners of the *Marloch* half the *Marloch's* damage, a sum which exceeded the sum named by 1794*l.* 17*s.* 8*d.*

It is contended that as a result of this conventional form of settlement the amount paid by the insurers for a total loss must be reduced by the amount they could on this conventional state of facts have recovered from the owners of the *Marloch*. They would then have to pay to the *Whimbrel* on the running down clause the total amount of the half of the *Marloch's* damages, which the *Whimbrel* would in the conventional state of facts have been called upon to pay to the *Marloch*. Therefore, says the plaintiff, they never paid a total loss on the insurance on hull, they only paid a total loss less the amount they are conventionally treated as receiving from the *Marloch*. Therefore the reinsurer says:

"I find that I have overpaid you, the insurers of the hull, 7760*l*. 4*s*. 10*d*. more than you paid on the policy on hull. I did not reinsure your liability on the running down clause, to which the loss of this sum should be attributed, therefore pay me back the amount of my overpayment."

This is an attractive argument, but in my judgment it is unreal, and unsound. It is susceptible of two answers: (1.) the amount obtained by subrogation does not enable the insurer to say that his liability for a total loss is reduced. He must acknowledge and pay his liability for total loss before he obtains any right to subrogation. What he recovers by subrogation does not reduce the amount payable for total loss, it is in the nature of salvage, which the insurer is entitled to keep. (2.) The special terms of the running down clause only affect the relations of the *Whimbrel* and her underwriters as to the insurance under the running down clause. They cannot be implied as part of the terms of the reinsurance contract, which is concerned only with the reinsurance of the amount of the total loss. These conventional terms were res inter alios acta.

The substance of the matter is, in my judgment, accurately stated by MacKinnon J. towards the end of his judgment: "The truth is that the shipowner has not received any sum in diminution of his total loss, and therefore the liability of the defendants to the shipowner to pay him a full total loss has not in any way been diminished, and as the liability of the defendants to pay the shipowner in full his claim for a total loss has not in any way been diminished, so in my judgment the liability of the plaintiff to pay the defendants in full has not been diminished in any way."

It follows that the defendants have not been overpaid by the plaintiff, and the plaintiff is not entitled to recover anything from the defendants.

For these reasons I agree that this appeal should be dismissed with costs.

SLESSER L.J. I agree and have very little to add. The payment which it is suggested that the *Whimbrel* recovered from the *Marloch*—an amount equal to that recoverable by the *Marloch* from the *Whimbrel*, less 1794*l*. 17*s*. 8*d*., is entirely notional. In reality, under the principle of single liability, the *Whimbrel* never recovered her half damage at all; it was cancelled out by the half damage of the *Marloch*: see *The Khedive*. (1) The *Whimbrel* alone actually paid damages.

The clause in the *Whimbrel's* policy with the defendants to the effect that "claims under this clause shall be settled on the principle of cross liability" cannot operate to actualize the notional payment to the *Whimbrel* of the half damage by the *Marloch* which was in fact never paid. Perhaps these words were intended to produce the result here contended for by the plaintiff, but, if so, they fail to effect it, because, in reality, the owners of the *Whimbrel* have not received any payment at all in reduction of her loss.

Appeal dismissed.

Solicitors for appellant: *W. A. Crump & Son.*
Solicitors for respondents: *Waltons & Co.*

(1) 7 App. Cas. 795.

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In re WHEAT.

Husband and Wife—Maintenance—Provisional Order in South Africa—Application to Metropolitan Magistrate to confirm—Objection to Jurisdiction of South African Court—Ground not contained in statutory Statement of Grounds sent from South Africa—Jurisdiction of Metropolitan Magistrate to consider—Maintenance Orders (Facilities for Enforcement) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 33), *s.* 4.

A provisional order for maintenance of a wife resident in South Africa was made in a magistrate's court in South Africa against her husband then domiciled and resident in England. The order came before a Metropolitan magistrate for confirmation, and he made an order confirming it:—

Held, on appeal, that as desertion is a continuing offence there was evidence upon which the South African court could find that the wife was deserted in South Africa, although the commencement of the desertion had been elsewhere.

Held, also, that it was open to the husband, on the application to confirm, to raise the question of the jurisdiction of the magistrate's court in South Africa to make the provisional order, although that ground was not one of those enumerated in the statutory "statement" sent over by the South African court of the grounds upon which the application for maintenance might have been opposed by the husband if a party to the proceedings.

Therefore, the Court, being satisfied, on consideration of the South African statutes, that the magistrate's court had jurisdiction, held that the Metropolitan magistrate's order confirming the provisional order was right.

CASE stated by a Metropolitan police magistrate.

On the requisition of the Secretary of State a summons was issued by a Metropolitan police magistrate on August 31, 1931, under s. 4, sub-s. 1, of the Maintenance Orders (Facilities for Enforcement) Act, 1920 (10 & 11 Geo. 5, c. 33), calling upon the appellant Wheat to show cause why a provisional maintenance order made in the magistrate's court at East London, Cape of Good Hope, Union of South Africa, on July 10, 1931, in terms of s. 3 of Act 7 of 1895 of the Acts of the Cape of Good Hope, read with s. 4 of Act 15 of 1923 of the Statutes of the Union of South Africa, whereby the appellant was ordered to pay to his wife, Alice Magdalene Wheat, 25*l*. per month, should not be confirmed. On November 11, 1931, the Metropolitan magistrate confirmed the order, subject to the modification that the appellant should pay 3*l.* weekly.

Upon the hearing of the summons the following facts were admitted or proved: At the date of the making of the provisional order on July 10, 1931, Mrs. Wheat was residing in East London, Cape of Good Hope, and the appellant was residing at 24 Meredith Street, Clerkenwell, London, England. The appellant was married to Mrs. Wheat in Germiston, Transvaal Province, Union of South Africa, in 1909, and there were three children of the marriage, a girl, who died in infancy, and two sons, aged at the date of the hearing twenty and seventeen years respectively. After the marriage the parties lived together in South Africa, and after the War in the island of St. Helena. A voluntary agreement for separation and maintenance was signed there in February, 1921. Thereafter Mrs. Wheat returned to South Africa, and the parties had not lived together since. In 1922 the appellant purchased a medical practice in London, and was still practising there. Since the separation the appellant had contributed from time to time to the support of Mrs. Wheat and/or the children. The appellant was born in Sheffield, and his father was English. In the first instance he went to South Africa to take up a hospital appointment, but regarded himself as domiciled in England since 1923. He had not at the time of the hearing of the summons in South Africa, nor had he since that date, any property in South Africa, nor had he at that time or since any residence in South Africa. On June 11, 1928, Mrs. Wheat obtained a judgment in the Westminster County Court in London against the appellant for 100*l.* arrears of moneys due under the separation agreement of February, 1921. Mrs. Wheat had at no time obtained an order for maintenance against the appellant other than the said provisional order. Eight grounds upon which the making of the provisional order might have been opposed by the appellant on the original application in South Africa were stated in the "Statement in terms of s. 4 (3.) of Act 15 of 1923."

It was contended before the Metropolitan magistrate that in addition to the said eight grounds the appellant was entitled to contend that the South African court had acted in excess of its jurisdiction, in that the appellant was since 1923 domiciled in England, and that consequently Mrs. Wheat had the same domicil, and that there was no jurisdiction in any court in South Africa to make a maintenance order against a husband unless he had property in South Africa, or his real home was there or he was resident there, and *Foord* v. *Foord* (1) was cited. It was also contended that the South African court had no jurisdiction, inasmuch as Act No. 7 of 1895 gave it power to make orders against husbands or fathers who had, within the territory of the Cape of Good Hope, deserted or left destitute wives or children, and that such power, where the husband or father was absent from the colony, was by s. 2 given only in the case of desertion, and that there was no evidence of desertion in South Africa.

The learned Metropolitan magistrate was of opinion (*a*) that although not included in the said statement of the eight grounds the appellant was entitled to raise the ground of want of jurisdiction; (*b*) that the domicil of the parties did not affect the jurisdiction, either as to the making or confirming of the provisional order. Consequently he was of opinion that the South African magistrate had jurisdiction to make the provisional order, and he confirmed it, subject to this case. The questions for the opinion of the Court were whether he had come to a correct determination upon that ground of defence, and whether, upon the above statement of facts, he had come to a correct decision in point of law.

Moller for the appellant. The domicil of the parties is English, and was so when the provisional order was made, for the wife follows the domicil of her husband, and he was domiciled here. Therefore the South African court had no jurisdiction to make the order : *Foord* v. *Foord.* (1) Again that court had no jurisdiction, because the appellant did not at the time reside nor had he any property within the area of

(1) [1924] South African Law Reports (W. L. D.) 81.

the court's jurisdiction: *Foord* v. *Foord.* (1) The South African Acts under which the court purported to make the order only deal with the case where the desertion takes place within its jurisdiction, and the desertion here, if any, took place in St. Helena, and there was no evidence of desertion in South Africa. Therefore there was no power to confirm this provisional order.

Alexander Cairns for the respondent. *Foord* v. *Foord* (1) is not in point. That case only decided that as a part of the law of divorce the court could not grant alimony to a wife whose husband neither resided nor had property within its jurisdiction. Domicil has nothing to do with liability to support a wife. There was evidence that the wife was deserted in South Africa, for desertion is a continuing offence: *Brown* v. *Brown* (2) and *Cobb* v. *Cobb* (3), although the first act of desertion may have taken place previously elsewhere. Therefore the South African court had power to make the provisional order, and the Metropolitan magistrate to confirm it.

Wilfrid Lewis as amicus curiae on behalf of the Home Secretary. The appellant, the husband, had the right to raise the point of want of jurisdiction in the South African court, although that ground was not included among the eight grounds in the "Statement in terms of s. 4 (3.) of Act 15 of 1923," setting out the grounds upon which the making of the provisional order might have been opposed in the South African court. That statement only constitutes conclusive evidence that the grounds set out could have been raised, but is not exclusive of other grounds, subject to proof that they could have been set up. Want of jurisdiction in the court can always be set up by a defendant.

Moller replied.

Cur. adv. vult.

1932. July 29. HUMPHREYS J. read the judgment of the Court. This is a case stated by a Metropolitan police magistrate who desires the opinion of this Court as to the correctness in point of law of his decision upon a summons issued under the provisions of s. 4, sub-s. 1, of the Maintenance Orders (Facilities for Enforcement) Act, 1920. The summons called upon Ernest Godfrey Wheat (the appellant before us) to show cause why a provisional maintenance order made by the magistrate's court at East London, Cape of Good Hope, whereby the said Ernest Godfrey Wheat was ordered to pay a sum of 25*l.* per month to his wife, Alice Magdalene Wheat, should not be confirmed. The provisional order is dated July 10, 1931, and a copy is attached to the case; according to that copy it purports to have been made in terms of s. 3 of Act No. 7 of 1895 of the Acts of the Cape of Good Hope, read with s. 4 of Act No. 15 of 1923 of the Statutes of the Union of South Africa, by the assistant magistrate in the magistrate's court for the district of East London, Cape of Good Hope, Union of South Africa. The learned Metropolitan police magistrate confirmed the provisional order with certain modifications, which are not material to the points raised in the case.

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(1) [1924] South African Law Reports (W. L. D.) 81.

(2) (1898) 79 L. T. 102.

(3) (1900) 64 J. P. 200. Also reported in [1900] P. 145, but not on this point.

The facts as found by the magistrate so far as material are as follows: Ernest Godfrey Wheat, the appellant, is the husband of the said Alice Magdalene Wheat, their marriage having taken place in the Transvaal Province of the Union of South Africa in 1909. In 1921, while the parties were living together in St. Helena, a voluntary agreement for separation and maintenance was executed. Thereafter Mrs. Wheat returned to South Africa and the parties have not lived together since that date. In 1922 the husband, who is English by birth and parentage and a doctor by profession, purchased a medical practice in London and has since that date resided in England. In April, 1928, the wife came to England and went to her husband's house in London. The husband refused to live with her. In June, 1928, the wife obtained a judgment in the Westminster County Court against her husband for 100*l.*, being arrears of moneys due to her under the voluntary agreement made in 1921 in St. Helena. The wife then returned to South Africa, and at the date of the making of the provisional order she was residing in East London, Cape of Good Hope. At that date the husband was residing in Clerkenwell, London, England.

Upon the hearing of the summons in London it was argued on behalf of the husband that the provisional order was made without jurisdiction. Three points were taken: (1.) That the jurisdiction of the court at East London depended upon the domicil of the parties which, it was contended, was English; (2.) that there was no jurisdiction in South Africa to make a maintenance order against a husband who was not resident there unless he had property there, and the case of *Foord* v. *Foord* (1) was cited in support of this contention; (3.) that it was essential that desertion should be proved to have taken place within the territory of the Cape of Good Hope and that there was no evidence of such desertion. The magistrate overruled all the objections and, as above stated, confirmed the provisional order.

In our opinion the magistrate was right in holding that the provisional order was not made without jurisdiction. Act No. 7 of 1895 of the Acts of the Cape of Good Hope is entitled, "The Deserted Wives and Children Protection Act" (s. 9), and is expressed to be an "Act for the Prevention of Destitution, and to make Provision for the Relief of Wives and Families Deserted and left Destitute." Sect. 2 enacts: "When any husband unlawfully deserts his wife or leaves her without means of support . . . . if complaint thereof be made on oath to the resident magistrate of the district in which such wife . . . . shall . . . . reside . . . . such resident magistrate may issue his summons to such husband . . . . to show cause why he should not support his wife." The Act proceeds to empower the magistrate in a proper case to order the husband to make periodical payments towards the maintenance of his wife. In the case of a husband, however, who did not attend the hearing of the summons such order could only be made upon proof of service of the summons, which service might be (s. 2) "in cases of desertion, where such husband . . . . is absent from the Colony" by

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(1) [1924] South African Law Reports (W. L. D.) 81.

"publication . . . . in the *Gazette* or in some newspaper circulating at any place in South Africa where such magistrate shall have reason to suppose that such husband . . . . resides or is." No provision was made at that date for dealing with the case of a husband who was not in South Africa, and the remaining sections of the Act show that its operation was and was intended to be confined to South Africa.

In 1920 the Maintenance Orders (Facilities for Enforcement) Act, 1920, was passed. The scope of that Act may be sufficiently gathered from the full title, which is "An Act to facilitate the enforcement in England and Ireland of Maintenance Orders made in other parts of His Majesty's Dominions and Protectorates and vice versâ." Sect. 12 of that Act provides in effect that it shall extend to such parts of His Majesty's Dominions outside the United Kingdom as have made reciprocal provisions for the enforcement of maintenance orders made in England or Ireland. In the year 1923 the Legislature of the Union of South Africa enacted such reciprocal provisions by Act No. 15 of 1923 of the Statutes of South Africa, and s. 4 of that Act enables a magistrate's court in the Union to which application is made for a maintenance order against a person resident in England to make, in the absence of that person, "any such order as it might have made if a summons had been duly served on that person and he had failed to appear at the hearing," but provides that such order shall be provisional only and shall have no effect until confirmed by a competent court in England.

This Act affords no guide as to the jurisdiction of a magistrate's court to make a maintenance order in any particular case, and we are thrown back upon the language of Act No. 7 of 1895 to ascertain whether the order in this case is one which the court "might have made" under that Act. A consideration of those Acts makes it apparent that the domicil of the parties does not in any way affect the jurisdiction of a resident magistrate to make such a provisional order, nor is the residence of the husband in England any bar to the making of such an order. The case of *Foord* v.

Foord (1) is not an authority for the proposition in support of which it was cited. In that case a wife who was suing for divorce applied to the Court for alimony pendente lite; the application was refused on various grounds, none of which have any relation to an application for maintenance under the Act of 1895. The first two points raised before the learned magistrate on behalf of the appellant therefore fail and were rightly overruled. Upon the third point the opinion of the learned magistrate is stated in para. 7 (*d*) of the case as follows: "That the jurisdiction given by Act No. 7 of 1895 is not in the district in which a husband deserts or leaves his wife destitute, but in the district in which the wife (who has previously been deserted or left destitute, whether in that district or elsewhere) resides at the time of making her complaint." This Court must not be taken to assent to that proposition of law in the form in which it is expressed, but in our judgment the decision of the learned magistrate may be supported on other grounds.

Mr. Cairns, who argued the case in support of the magistrate's decision, submitted that there was evidence that the wife was deserted and left without means of support in East London. We think this is so. There can be no doubt that desertion is a continuing act. Many authorities could be quoted in support of that view, but it is sufficient to refer to the case of *Heard* v. *Heard* (2), and to the judgment of Jeune P. in that case, a judgment in which Gorell Barnes J. entirely agreed. The headnote of the case is as follows (2): "For the purpose of proceedings under section 4 of the Summary Jurisdiction (Married Women) Act, 1895, the desertion of a married woman by her husband is a continuing act; an application by the wife for an order under that section need not, therefore, be made within six months of the commencement of the desertion." This is the judgment of the President (2): "In this case the husband left the wife more than six months before the summons was taken out against him, and the question is whether in consequence the proceeding is barred by the limitation of time imposed by the Summary Jurisdiction Acts, in accordance with which applications under the Summary Jurisdiction (Married Women) Act, 1895, must be made; or, in other words, whether desertion is a continuing act within the meaning of s. 4 of the last-mentioned Act. It is quite true that the desertion of a wife by her husband—that is to say, his leaving her against her will, with the intention of not returning—may be considered as an act complete in itself. But it is equally true that, so long as a husband remains absent, he continues to desert his wife, and desertion may in this way be considered as a continuing act." In the course of that judgment reference was made to a case decided in this Court of *Wilkinson* v. *Wilkinson*. (1) It would be useful to read a few lines from the judgment of Day J. in that case. The Court consisted of Lord Coleridge C.J. and Day J. In the course of his judgment Day J. observed as follows (2): "The mistake is in assuming that desertion is a specific act, whereas it is more proper to describe it as a course of conduct continuing over a considerable period."

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(1) [1924] South African Law Reports (W. L. D.) 81.

(2) [1896] P. 188, 190.

It is further to be observed that the words of s. 2 of Act No. 7 of 1895 are: "deserts his wife or leaves her without means of support." We have not been supplied with a copy of the deposition of the wife made in East London, which was before the learned magistrate who states this case, but we are bound to assume in the absence of any suggestion to the contrary that there was evidence before the magistrate who made the provisional order that the wife, who had been deserted in England, was still being deserted and was left without means of support by her husband in the place where she was residing at the time when the provisional order was made.

That disposes of the appeal in this case, but it is desirable to refer to a question raised in the case by the learned magistrate which was not argued before us. The question arises upon the language of s. 4, sub-s. 3, of the Maintenance Orders (Facilities for Enforcement) Act, 1920. Sub-s. 1 of

(1) (1894) 58 J. P. 415.

(2) 58 J. P. 416.

s. 4 provides: "Where a maintenance order has been made by a court in a part of His Majesty's dominions outside the United Kingdom to which this Act extends, and the order is provisional only and has no effect unless and until confirmed by a court of summary jurisdiction in England or Ireland, and a certified copy of the order, together with the depositions of witnesses and a statement of the grounds on which the order might have been opposed has been transmitted to the Secretary of State, and it appears to the Secretary of State that the person against whom the order was made is resident in England or Ireland, the Secretary of State may send the said documents to the prescribed officer of a court of summary jurisdiction, with a requisition that a summons be issued calling upon the person to show cause why that order should not be confirmed, and upon receipt of such documents and requisition the court shall issue such a summons and cause it to be served upon such person." It was on the hearing of the summons under that sub-section that this question arose. Sub-s. 3 provides as follows: "At the hearing it shall be open to the person on whom the summons was served to raise any defence which he might have raised in the original proceedings had he been a party thereto, but no other defence, and the certificate from the court which made the provisional order stating the grounds on which the making of the order might have been opposed if the person against whom the order was made had been a party to the proceedings shall be conclusive evidence that those grounds are grounds on which objection may be taken."

The learned magistrate asks this Court to say whether he was right in holding that the above provision did not preclude the husband from raising the defence of want of jurisdiction in the court which made the provisional order, although that ground of defence was not included in the certificate of grounds on which the making of the provisional order might have been opposed. In our opinion he was plainly right in so holding. The sub-section makes the certificate conclusive evidence that the grounds stated therein are grounds upon which objection may be taken, but does not confine the

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possible objections to those grounds. The only limitation upon the objections which may be raised by the person opposing the confirmation of the order is that the objection must be one which would have been open to him upon the original proceedings had he been a party to them. Objection to the jurisdiction of the court would clearly have been open to the husband upon the original proceedings, and that objection was therefore open to him on the proceedings before the learned magistrate.

The appeal, therefore, must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Houseman & Co.*
Solicitor for respondent: *F. H. Adams.*
Solicitor for Home Secretary: *Treasury Solicitor.*

W. L. L. B.

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